(25,543)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 713.

THE SAVINGS BANK OF DANBURY, OF DANBURY, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

DIETRICH E. LOEWE, AS SURVIVING PARTNER OF THE FIRM OF D. E. LOEWE & CO.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 10, 1916.

a United States Circuit Court of Appeals for the Second Circuit.

No. 1807. Law.

DIETRICH E. LOEWE, as Surviving Partner of the Firm of D. E. LOEWE & Co., Plaintiff-in-Error,
vs.
THE SAVINGS BANK OF DANBURY, Defendant-in-Error.

TRANSCRIPT OF RECORD.

Daniel Davenport, Bridgeport, Conn.; Walter Gordon Merrit, 135 Broadway, New York City, Attorneys for Plaintiff-in-Error.
J. Moss Ives, Danbury, Conn., Attorney for Defendant-in-Error.

United States Circuit Court of Appeals, Second Circuit. Filed Mar. 9, 1916. William Parkin, Clerk.

b *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

To The President of the United States to the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Because in the record and proceedings as also in the modification and affirmance of the judgment of a plea which is in the said Circuit Court of Appeals for you or some of you, between Dietrich E. Loewe, as surviving partner of the firm of D. E. Loewe & Co., plaintiff in error and The Savings Bank of Danbury, defendant in error, a manifest error hath happened to the great damage of the said defendant in error as by complaint appears,

We being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ so that you have the same in the said Supreme Court of Washington within thirty days from the date hereof and that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief Justice

of the United States, the 11th day of August, in the year of our Lord one thousand nine hundred and sixteen.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals, Second Circuit.

c [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Dietrich E. Loewe, etc., Plaintiff-in-Error, vs. Savings Bank of Danbury. Writ of Error. J. Moss Ives, Danbury, Conn., Attorney for Defendant-in-Error. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 11, 1916. William Parkin, Clerk.

1 *Writ of Error.*

The United States Circuit Court of Appeals for the Second Circuit.

The President of the United States of America, to the Judge of the District Court of the United States for the District of Connecticut, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between Dietrich E. Loewe, as surviving partner of the firm of D. E. Loewe & Co., Plaintiff, and The Savings Bank of Danbury, Defendant, a manifest error hath happened, to the great prejudice and damage of the plaintiff, as is said and appears by the petition herein, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Second Circuit, together with this writ, so that you have the same at the City of New York, in the State of New York, in the said Circuit, on the 9th day of March, 1916 next, in the said Circuit Court of Appeals, to be then and there held; that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error
2 what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 24th day of February, 1916.

C. E. PICKETT,
Clerk of the United States District Court for the District of Connecticut.

The foregoing writ of error is hereby allowed this 24th day of February, 1916.

EDWIN S. THOMAS,
United States District Judge.

(Endorsed:) Filed 24th Feb., 1916.—Charles Elliott Pickett.—Clerk.

Writ and Complaint.

UNITED STATES OF AMERICA,
District of Connecticut:

President of the United States to the Marshal of the District of Connecticut, Greeting:

You are hereby commanded to attach to the value of one hundred thousand dollars ($100,000) the goods, or estate of The Savings Bank of Danbury, a corporation organized and existing under the Laws of the State of Connecticut, and located and having its principal place of business in the town of Danbury and State of Connecticut, and it summon to appear before the District Court of the United States for the District of Connecticut to be held at New Haven in said District on the First Monday of October, 1913, then and there to answer unto D. E. Loewe and Martin Fuchs,
3 both residents of the Town of Danbury in the State and District of Connecticut in a civil action where the plaintiffs complain and say:

1. The plaintiffs brought a civil action to the Circuit Court of the United States for the District of Connecticut holden at Hartford in and for the District of Connecticut on the second Tuesday of October, 1903, by a lawful writ of attachment issued and dated on the 31st day of August, 1903, signed by R. F. Carroll, Deputy Clerk of said Circuit Court for the said District of Connecticut demanding two hundred and forty thousand dollars ($240,000) damages and costs directed to the Marshal of the United States for the District of Connecticut directing him to attach to the value of two hundred and fifty thousand dollars ($250,000) the goods and estate of each of the following persons, to wit: William P. Bailey, Charles Bailey, Frederick Benedict, John Cords, Virgil Dibble, T. Archibald Evans, Charles Frost, Howard S. Gilbert, George H. Gilbert, Charles Green, John Halpin, Reuben Johnson, Henry C. Judd, John L. Kane, Martin Lawlor, Charles Lathrop, George W. Morehouse, Byron Morgan, Barney Murphy, Owen Murray, William Ochs, William Ohler, Levi Short, Orrin Smith, William Stone, Myron Trowbridge, Patrick Troy, all of Bethel, Theophilus Abieniste, Andrew Aitken, Nicholas W. Allen, Thomas H. Allen, Daniel H. Barnes, Nicholas W. Barzin, Clemens Beschele, Frederick S. Blackburn, John Blake, Simon Blake, Herman H. Bohman, Nelson H. Booth, James N. Boughey, Thomas Boyd, Peter J. Brennan, Alphonse Bresson, Theodore Bright, Bryon S. Brooks, Andrew G. Brown, Chauncey H. Butler, James P. Callahan, John J. Callahan, Achille Canale, Thomas J. Cassidy, William Clancy, Elmer R. Clark, John H. Collins, Lewy W. Comes, Patrick Connolly, Michael Corbett, James D. Costello, John H. Craft, Byron W. Crane,
4 James Crotty, John Crotty, Peter T. Currie, William Deakin, George F. Denton, James Dillon, William S. Dutcher, John

Dyer, John Ellegett, Patrick Ellegett, Carl Erdman, Timothy H. Farrell, Patrick J. Feeley, Patrick J. Fisher, Emil Floyske, Thomas Foley, Peter Gallagher, Christian Gottlieb Garni, William E. Gartner, Martin Gorman, Michael C. Griffin, Wright Hampson, David J. Hardy, Alexander Harkness, John Harkness, Patrick Hart, John Hassett, Stephen Havren, Michael Hennessy, George M. Herrick, Charles A. Hodge, Adolph Holdeichel, Nathan C. Hoy, William Humphries, Patrick F. Hunt, Charles W. Hurd, Michael Hurd, Patrick E. Jeffrey, Daniel Kearns, Martin Keating, Thomas Keenan, Daniel P. Kelly, Michael F. Kenney, John Keogh, Charles J. King, Frank Kornhass, Frank E. Krebs, Martin Lauf, Edward D. Lees, John Leonard, Thomas Leonard, Michael F. Lynch, John Morris, Jeremiah McCarthy, Patrick J. McCarthy, Patrick T. McCarthy, Martin McCue, Thomas E. McGauley, Martin McGettrick, James F. McGlone, John McGlone, Peter McGlone, Patrick McGrath, Charles F. McHan, Thomas McHugh, Daniel McInerey, Frank Meath, Henry Messer, Henry C. Michael, George J. Miller, Gustave Mougin, Eugene L. Mulkin, Daniel Murphy, Timothy Murray, John B. Nowlan, William V. Nowlan, George T. Oakley, Peter O'Boy, Louis E. Orton, Daniel J. Osborne, Alvah S. Pearce, George H. Phillips, Peter Picken, Arthur L. Pickett, John Pribula, Jacob Prinz, Christian Rheinhold, Frank Rhode, Frank E. Seaman, Hugh C. Shalvoy, Charles Shaffer, Frederic L. Stahl, George Stuckley, Michael E. Sullivan, William S. Sullivan, Joseph Tosi, Thomas E. Waters, Samuel S. Wilson, Frank K. Wildman, all of Danbury, Fanton W. Beers, Albert Berg, William A. Brennan, Stephen Carlin, Edward Cunningham, George A. Davis, Charles Flynn, Addison Hathaway, Peter F. Kearney, Patrick Keating, James Kinnane, Thomas Layhe, Charles Moore, S. Wallace Osborne, John E. Paul, Robert Pearson, John Redway, Owen Reilley, Daniel Riordan, John E. Rooney, Thomas F. Saunders, John W. Scully, Max Singerwald, Charles Smith, Frederick Taylor, Peter Ward, William S. Weisheit, James Whitney, all of Norwalk, and to leave an attested copy of said writ and of the accompanying complaint at least twelve days before the session of court with The Savings Bank of Danbury the present defendant corporation having its principal place of business at the Town of Danbury as the agent, trustee and debtor of the aforesaid persons named therein as defendants.

2. Said writ and accompanying complaint was duly served on each of the aforesaid persons named therein as defendants and also a true and attested copy of the same was by said United States Marshal for the District of Connecticut left with said The Savings Bank of Danbury defendant herein as agent, trustee and debtor of and to each of the aforesaid persons named therein as defendants more than twelve days before the sitting of said court to which said writ, being duly served, was returned.

3. By legal removes said action came to the May Term of the District Court of the United States for the District of Connecticut holden at Hartford on the fourth Tuesday of May, 1912, when and where, to wit on November 15th, 1912, the plaintiffs recovered

judgment against each of the aforesaid persons for Two hundred and forty thousand dollars ($240,000) damages and Twelve thousand one hundred and thirty and 90/100 dollars ($12,130.90) costs and statutory attorney fees.

4. Thereupon the plaintiffs took out execution for the sums aforesaid with interest and twenty-five cents for said execu-
6 tion against each of said defendants individually which execution was dated November 25th, 1912, and signed by E. E. Marvin, Clerk of said Court and directed to the Marshal of the United States for the District of Connecticut to serve and return.

5. Said execution on November 25th, 1912, was put into the hands of Sidney E. Hawley, United States Marshal, for the District of Connecticut, who on December 24, 1912, by direction of the plaintiffs made demand of The Savings Bank of Danbury the present defendant as agent, trustee and debtor of and to each of said judgment debtors severally of the sums contained in said execution and his costs and fees and of any estate of each or any of said several judgments debtors in its hands, or moneys due from it to each or any of said judgment debtors severally by duly making demand upon the proper officer of said Bank as provided by statute at the office or usual place of business of said defendant corporation within its regular business hours.

6. The Savings Bank of Danbury, the defendant herein, through its said officer of whom demand was made, refused to pay said execution or to show any estate of any of the aforesaid individual judgment debtors, or to pay any debt due from it to any of the aforesaid judgment debtors individually to said officer whereon to levy said execution with his fees amounting to $90.85 all of which doings on said execution said Marshal made due return by endorsing the same on said execution and returning the same to the Clerk of said Court wholly unsatisfied.

7. The defendant at the time the copy of said writ was left with it in service was indebted to each of said defendants severally
7 in various sums of money and had in its hands the estate of each of said defendants and yet it would not expose or discover any said estate of any of said defendants whereon said execution might be levied nor pay said debts or any part thereof to said officer, and that the aggregate amount of said moneys so owed by defendant and the aggregate amount of estate so possessed by the defendant exceeded $100,000.

8. Said judgment has never been reversed nor has the amount due thereon and on said execution as aforesaid, or any part thereof ever been paid.

The plaintiffs claim $100,000 damages.

Elmore S. Banks, of Fairfield, within said State and District of Connecticut, is recognized in the sum of $150 to prosecute, etc.

Of this writ with your doings thereon make due return.

Witness Hon. Edwin E. Marvin, Clerk of the United States District Court for the District of Connecticut, the office of Judge of said Court being vacant, and the seal of said District Court at Hartford in said District this 6th day of September, 1913.

R. F. CARROLL,
Deputy Clerk.

The defendant, The Savings Bank of Danbury, by J. Moss Ives, its attorney subsequently entered its general appearance on or about the 27th day of September, 1913.

8 *Extract from Docket.*

February 16th, 1915.—Judgment by default for want of a timely answer or other pleading, this day entered.

United States District Court, District of Connecticut.

No. 1807.

D. E. LOEWE et al.
vs.
THE SAVINGS BANK OF DANBURY.

Action at Law.

To Messrs. Davenport & Banks and Walter G. Merritt, Attorneys for the Plaintiffs.

Please take notice that the annexed motion to cite in assignee of debt under foreign attachment, and motion for hearing in damages, will be presented to the Court for hearing on the first Monday of June, 1915, to wit,—the 7th day of June, 1915, at ten o'clock in the forenoon of that day, or as soon after as counsel may be heard.

Dated at Hartford, May 13th, 1915.

GROSS, HYDE & SHIPMAN,
Defendant's Attorney-.

9 United States District Court for the District of Connecticut.

Action at Law. No. 1807.

D. E. LOEWE et al.
vs.
THE SAVINGS BANK OF DANBURY.

Motion for Hearing in Damages.

The defendant in the above entitled action hereby moves that a hearing in damages upon default be had by the Court.

THE SAVINGS BANK OF DANBURY,
By J. MOSS IVES, *Its Attorney.*

GROSS, HYDE & SHIPMAN,
Of Counsel.

United States District Court for the District of Connecticut.

Action at Law. No. 1807.

D. E. LOEWE et al.
vs.
THE SAVINGS BANK OF DANBURY.

Motion to Cite in Assignee of Debt under Foreign Attachment.

The defendant in the above entitled action says:

1. That at the time the writ described in paragraph 2 of the complaint was left with the defendant, the following defendants had on deposit with it the sums set opposite their respective names:

Martin Lawlor	$614.70
George Morehouse	294.36
George H. Gilbert, or Anna E. or Julia E.	29.21
Howard S. Gilbert	3.85
Daniel P. Kelley	720.59
Patrick Connelly, or Margaret	51.31
Albert Hoyt	2,309.64
Owen Murray	82.75
John Halpin	954.90
Edward Manion	150.88
Edward Culhane	105.03
Patrick Wixted	8.24
Henry Gilbert	513.14
Starr Bassett, or Jane E.	742.13
Myron Trowbridge	10.83
Frederick Benedict	260.00
Orrin Smith	747.06
Reuben Johnson	187.09
E. Romain Barnum	449.67
Byron Morgan	1,925.56
Joseph Burr	257.83
Daniel H. Barnes	42.16
Clemens Beschele	25.00
Frederick S. Blackburn	1,191.46
Nelson H. Booth	537.51
Thomas Boyd	41.88
John Bradshaw	508.75
Theodore Bright	792.04
Orrin L. Bronson	92.93
Byron S. Brooks	199.47
Thomas D. Brooks	25.44
John H. Collins	377.56
Lewy W. Comes	730.10
Byron W. Crane	1,810.21
Michael Crowe	1,965.38
William Deakin	1,227.21

William S. Dutcher	5.09
Patrick Elligett	234.53
Patrick Flanagan	54.18
Emil Floyske	1.06
William E. Geartner	5.82
Patrick Hart	100.00
William Humphries	398.18
Patrick F. Hunt	466.02
John Keough, "Keogh"	3,155.37
Frank E. Krebs	104.74
Thomas Leonard	103.89
William E. Luke	18.57
Thomas E. McGauley	44.66
James F. McGlone	80.94
Thomas McHugh	150.47
Frank Meath, or Margaret Meath	624.82
Henry Messer	1.57
Henry C. Michael	526.50
George J. Miller & Lena	68.37
Patrick Moffitt	1,252.20
Daniel Murphy	216.39
Peter O'Boy	1.87
George Stuckey	368.01
Stephen Stucky & Sarah Stucky	324.06
Thomas E. Waters	77.71
Total	$28,370.89

2. Since said writ was left with the defendant, the declared and accrued dividends on said sums on deposit amount to $15,039.10.

3. On the — day of December, 1903, and on various dates subsequent thereto, said depositors by instruments in writing assigned said sums on deposit to the United Hatters of North America, a
12 voluntary association of hatters, located and having an office and principal place of business in the City, County and State of New York, which written assignments were duly lodged with the defendant, and on the 5th day of February, 1915, said United Hatters of North America notified this defendant that it claimed all of the dividends which had accrued thereon after said writ was served, and demanded the payment to it of such dividends.

4. On the 5th day of February, 1915, the plaintiffs demanded of this defendant the sums of money attached as aforesaid in the defendant bank, together with the dividends due thereon.

5. The defendant has no claims upon said principal sums of money attached, nor upon the dividends which are due thereon, and is willing to pay the same to such person as the Court shall direct.

The defendant therefore asks

That the said United Hatters of North America be given notice in writing, signed by proper authority, that this scire facias is pending, which notice shall be given in such time and manner as the Court shall direct, and further directing the time in which said United Hatters of North America shall give to this defendant suffi-

cient security to indemnify it against all costs it may suffer in the event that judgment shall be given against it in this action, in accordance with the requirements of Section 937 of the General Statutes of Connecticut.

THE SAVINGS BANK OF DANBURY,
By J. MOSS IVES, *Its Attorney.*

GROSS, HYDE & SHIPMAN,
Of Counsel.

13 *Order.*

United States District Court for the District of Connecticut.

Action at Law. No. 1807.

D. E. LOEWE et al., Plaintiffs,
against
THE SAVINGS BANK OF DANBURY, Defendant.

Order to Cite in Assignee of Debt under Foreign Attachment.

The defendant in the above entitled action having filed its motions asking for a hearing in damages upon the default rendered therein, and also asking that The United Hatters of North America, a voluntary association of hatters located and having an office and principal place of business in the City, County and State of New York, be given notice of the pendency of this proceeding, in accordance with the provisions of section 937 of the General Statutes of Connecticut, Revision of 1902, as by said motions on file more fully appears, and the Court having heard the parties thereon and granted said motions, it is therefore

Ordered, that a hearing in damages upon said default be heard by this Court, and that The United Hatters of North America aforesaid be given notice that this proceeding of scire facias is
14 pending by depositing a copy of the writ and complaint in this action and of this order, on or before the 29th day of September, 1915, in the post office, postage paid, at Hartford, directed to said United Hatters of North America, #Waverly Place, New York City, by registered mail, and that a similar copy of said writ and complaint and order be left with William T. Tammany, City National Bank Building, South Norwalk, Connecticut, attorney for said United Hatters of North America, on or before said 29th day of September, 1915, by some proper officer or indifferent person, and that if said United Hatters of North America have any claim to the monies or debts attached and sought to be recovered in this action, or any portion thereof, it give to this defendant security in the sum of Two Hundred and Fifty dollars to i-demnify it against all costs and appear before this Court on or before the 11th day of October, 1915, and be heard upon said hearing in damages and defend the

same, or otherwise be barred of all claim and demand upon said monies and debts.

Dated at Hartford, this 24th day of September, 1915.

EDWIN S. THOMAS,
U. S. D. J.

Thereupon the United Hatters of North America, filed its bond as required by said order and said bond was approved and accepted.

15 *Scire Facias.*

United States District Court for the District of Connecticut.

Action at Law. No. 1807.

D. E. LOEWE et al., Plaintiffs,
against
SAVINGS BANK OF DANBURY, Defendant.

Answer of United Hatters of North America.

The United Hatters of North America, cited in to defend in the above entitled cause pursuant to the order of said Court, dated September 24th, 1915, answers as follows:

1. Paragraphs 1, 2 and 3 of the complaint are admitted.

2. As to the allegations contained in paragraphs 4, 5 and 6 this defendant has no knowledge or information thereof sufficient to form a belief.

3. That the defendant was in possession of money or estate of certain of the defendants as alleged in paragraph 7 at the time said writ was left in service is admitted. Except as herein admitted, said paragraph 7 is denied.

16 4. That said judgment has never been reversed, as alleged in paragraph 8 is admitted. Except as herein admitted, said paragraph 8 is denied.

5. After said writ was left in service and said attachment had been made, this defendant purchased from the original defendants, named in paragraph 1 of the complaint whose estate had so been attached, the said attached estate and paid said defendants full value therefor, and said estate was duly transferred by said defendants to this defendant, and notice thereof was given to the above named defendant Bank, and this defendant thereupon became the equitable and bona fide owner of said estate.

6. Since said attachment, various dividends have been declared by said defendant Bank, and said dividends are owned by and due to this defendant on said attached accounts by virtue of the transfer of said estate to this defendant, as set forth in paragraph 5 hereof, and this defendant has demanded of said defendant Bank the payment of said dividends.

7. Said Bank has neglected and refused to pay said dividends to this defendant.

8. The estate in the possession of said defendant Bank at the time said writ was left in service and said attachment made has, with the consent of this defendant, been delivered and paid to the plaintiffs in this action, D. E. Loewe & Company.

9. This defendant claims the dividends which have been declared by said defendant Bank on said attached moneys and estate, and to be entitled to receive the same by virtue of the transfer of said attached estate by the original defendants, as set forth in paragraph 5.

17 This defendant, therefore, prays judgment in its favor for the amount of said dividends, namely, $15,000.00.

THE UNITED HATTERS OF NORTH AMERICA,
By WM. F. TAMMANY,
Its Attorney.

(Endorsed:) Filed October 11th 1915.

Subsequently Martin Fuchs, one of the plaintiffs died and his death was duly noted on the record prior to final judgment and the case was thereafter continued by Dietrich E. Loewe as the surviving partner of D. E. Loewe & Co.

Judgment File.

District Court of the United States, District of Connecticut.

No. 1807. Law.

DIETRICH E. LOEWE, of Danbury, Connecticut, as Surviving Partner of the Firm of D. E. LOEWE & Co., Plaintiff,
vs.
THE SAVINGS BANK OF DANBURY, of Danbury, Connecticut, Defendant.

Judgment.

This action of scire facias, by complaint on file claiming $100,000 damages, came to this court at its term commencing on the
18 first Tuesday of December, 1913, when the defendant appeared.

Thence by continuances it came to the December term, 1914, when the defendant on February 16th, 1915 suffered a default therein.

Thence by continuances it came to the May term, 1915 when the defendant moved for a hearing in damages upon said default as by written motion on file, which motion was granted.

Upon the defendant's written motion on file, alleging that at the time the writ, described in Paragraph 2 of the complaint, was left with the defendant in service, certain named defendants therein had on deposit with it various sums of money amounting in the aggregate to $28,370.89, that on various dates subsequent thereto said depositors, by instruments in writing, had assigned said sums on

deposit to the United Hatters of North America, a voluntary association of hatters located and having an office and principal place of business in the city, county, and state of New York, which written assignments had been duly lodged with the defendant, and that on the 5th day of February 1915, said United Hatters of North America notified said defendant that it claimed all of the dividends which had accrued thereon after said writ was served, and demanded the payment to it of such dividends, and praying for an order of notice to said United Hatters of North America that this scire facias was pending, and directing the time in which they should give the defendant sufficient security to indemnify it against all costs it might suffer in the event the judgment should be given against it in this action, the court on September 24th, 1915 ordered said notice to be given and directed the time in which said United Hatters of North America should give such security.

Thereupon said United Hatters gave such security for costs
19 and appeared and filed an answer as on file in which it alleged that after said writ was left in service and said attachment had been made, it purchased the said attached estate from the original defendants named in Paragraph 1 of the complaint herein, whose estate had been so attached, and paid said defendants full value therefor; and that said estate was duly transferred by said defendants to it, and that notice thereof was given to the above named defendant bank, and thereupon said United Hatters became the equitable and bona fide owner of said estate; that since said attachment various dividends had been declared by said defendant bank and that said dividends are owned by and are due to the United Hatters on said attached accounts by virtue of the transfer of said estate to it; that it had demanded of said defendant bank the payment of said dividends which the bank had neglected and refused to pay to it; and it claimed the dividends which have been declared by said defendant bank on said attached money and estate by virtue of the transfer to it of said attached estate by the original defendants.

Thence by legal removes this case came on to be heard before the court on the 23rd day of December, 1915, for an assessment of damages on said default and the court, having heard the parties, finds the issues as herein set forth, and, at the request of the plaintiff, specially sets forth the facts found as follows:

1. That the allegations of the paragraphs of the complaint numbered 1, 2, 3, 4, 5, 6, and 8 are true, and the allegations of paragraph 7 of the complaint are true except that the aggregate amount of the moneys so owned and possessed by the defendant as therein alleged was $18,461.54.

2. That the said sums of money so attached were savings bank deposits which the defendant held for the depositors under
20 the terms of its charter which provided as follows:

"Sec. 3. All deposits of money received by said corporation shall be used and improved to the best advantage, by loaning the same, in a manner not inconsistent with the laws of this state; or by investing the same by purchase in bank stock or any other public stock of any state, and disposing of the same as the interest of said corporation may require; and the income or profits thereof shall be

applied as dividends among the persons making the deposits, their executors and administrators, in just proportion, with such reasonable reduction as may be chargeable thereon. And the principal sums of such deposits may be withdrawn by the owners thereof, or by any other person or persons duly authorized for that purpose, on giving notice of such intention in writing, and lodging the same with the secretary of said corporation at least four months previous to such withdrawal."

3. That after said writ was left in service and said attachment had been made the United Hatters purchased the said attached estate from the original defendants named in Paragraph 1 of the Complaint herein, whose estate had been so attached, and paid said defendants full value therefor, and said estate was duly transferred by said defendants to said United Hatters, and notice thereof was given to the defendant herein, and said transferee thereupon became the equitable and bona fide owner of said estate, subject to the rights of the plaintiff acquired by virtue of said attachment.

4. That since said attachment, the defendant herein has, in
21 accordance with the terms of its charter, used and improved the moneys so deposited with it, and has regularly declared dividends upon said several deposits payable from the income and profits earned by the defendant from these and its other deposits and that the aggregate amount of dividends so declared upon the several deposits levied upon by said writ of attachment is $11,278.13.

5. That subsequent to the commencement of this action, the defendant on June 26th, 1915, with the consent of the United Hatters, paid to the plaintiff $17,558.37 and on July 8th, 1915, the further sum of $474.65 on account of the principal of said deposits so levied upon.

6. That there is still due and owing to the plaintiff on account of the principal of said attached deposits, the sum of $428.52.

The court finds the following conclusions of law from these facts:

That the plaintiff is entitled to recover $428.52 the amount of the principal of said attached deposits remaining unpaid.

That the plaintiff is not entitled to recover the interest or dividends on said deposits which accrued after said attachment.

That the plaintiff is not entitled to any recovery from the defendant on account of interest on any of said deposits.

Whereupon it is adjudged that the plaintiff recover of the defendant $428.52 and his costs taxed at — dollars and — cents.

EDWIN S. THOMAS,
U. S. D. J.

New Haven, Conn., 22 Feb'y, 1916.

22 *Opinion.*

District Court of the United States, District of Connecticut.

No. 1801. Law.

D. E. LOEWE et al.
vs.
THE UNION SAVINGS BANK OF DANBURY.

No. 1802. Law.

D. E. LOEWE et al.
vs.
NORWALK SAVINGS SOCIETY.

No. 1805. Law.

D. E. LOEWE et al.
vs.
SOUTH NORWALK SAVINGS BANK.

No. 1807. Law.

D. E. LOEWE et al.
vs.
SAVINGS BANK OF DANBURY.

Daniel Davenport, Esq., of Bridgeport, Conn., and Walter Gordon Merritt, Esq., of New York City, for Plaintiffs.

John R. Booth, Esq., of Danbury, Conn., for The Union Savings Bank of Danbury.

John H. Light, Esq., of Norwalk, Conn., for Norwalk Savings Society and South Norwalk Savings Bank.

23 J. Moss Ives, Esq., of Danbury, Conn., for Savings Bank of Danbury.

William F. Tammany, Esq., of South Norwalk, Conn., for The United Hatters of North America, assignee.

Martin J. Cunningham, Esq., of Danbury, Conn., for The United Hatters of North America.

THOMAS, *District Judge:*

These are actions in the nature of scire facias brought pursuant to Section 931 of the General Statutes of Connecticut, Revision of 1902, to enforce attachments by mesne process in the original actions upon which these actions are founded. The attachments were made pursuant to the provisions of Section 880 of the General Statutes of Connecticut, Revision of 1902, and covered certain funds on deposit with these defendants,—savings banks incorporated under charters from the Connecticut General Assembly.

Before the rendition of final judgment in the original action in which the attachments were made, the defendants as-igned to The United Hatters of North America, a voluntary association, the dividends or interest accruing on said deposits and which were declared after the attachment, and by virtue of said assignments said United Hatters of North America claim to be the owner of said dividends.*

---

* It was stipulated between counsel that the transfers of the accounts of the defendants in the Savings Bank of Danbury were all made substantially as follows:—

"BETHEL, CONN., Nov. 9, 1903.

Treasurer of the Savings Bank of Danbury:

Pay John Phillips, Sec., or bearer, the whole amount standing to my credit, and charge the same on my deposit Book No. 29989.

FREDERICK E. BENEDICT.

Witness:
MICHAEL CROWE.

$819.23. DANBURY, CONN., April 18th, 1904.

Savings Bank of Danbury.

Pay Martin Lawlor, Sec'y &c., or order, Eight Hundred & Nineteen and 23/100 Dollars (or so much as may be due), on my Deposit Book, No. 27808.

THEODORE G. BRIGHT.

Witness:
G. FRED LYON."

And that the deposits in The Union Savings Bank of Danbury, the Norwalk Savings Society and the South Norwalk Savings Bank, were all transferred as follows:—

$502.92. DANBURY, CT., Dec. 14, 1903.

The Union Savings Bank of Danbury, Conn.

Pay to John Phillips, Sec'y, or order, Five Hundred & Two & 92/100 Dollars, and charge my account No. 20562.

(Sign Here) FRED S. BLACKBURN.

Witness:
H. C. SHALVOY."

And that each transfer was accompanied by delivery of the deposit book of the defendant making the transfer.

24 The association has appeared to defend these actions pursuant to an order heretofore entered herein under Section 937 of the General Statutes of Connecticut, Revision of 1902 (see

226 Fed. 294) and has filed an answer in which it is alleged that the dividends or interest accruing and declared subsequent to the original attachment were not held by the attachment but passed to it and became its property by virtue of the assignments. So the sole question in this proceeding is whether the interest or dividends which have accumulated in the hands of the several banks and which would belong to the depositors but for the assignments, now belong to the judgment creditor by virtue of the original attachment, or to the assignee of the fund by virtue of the assignments which were made after the attachments.

Section 880 of the General Statutes, Revision of 1902, provides that where a debt is due from any person to the defendant in a civil action the plaintiff may insert in his writ a direction to the officer to leave a true and attested copy thereof and of the accompanying complaint, at least twelve days before the session of the Court to which it is returnable with such debtor of the defendant, and that from the date of leaving such copy any debt due from such
25 garnishee shall be secured in the hands of such garnishee to pay such judgment as the plaintiff may recover. The liability of the garnishee is further defined in Section 931 of the General Statutes of Connecticut, Revision of 1902, so as to include,

"all the effects in the hands of the garnishee at the time of the attachment, or debts then due from him to the defendant,"

excepting that in the case of a debt, legacy, or distributive share the liability of an executor, administrator, or trustee garnisheed shall extend to and include any debt, legacy, or distributive share "due or to become due."

So the question in the present case is as to the meaning of the words "debt is due" in Section 880, and the words "debts then due" in Section 931, and the answer to this question will furnish the answer to the proposition of law here involved. The meaning of these words has several times been before the Supreme Court of Errors of Connecticut for judicial ascertainment and definition. While it has always been the policy of the Courts of Connecticut to liberally construe the statute and not to restrict its application to liquidated debts; they have, nevertheless, at all times insisted that in order that the debt sought to be attached should be "due," there should be an existing obligation for which the garnishee would be liable to the defendant in an action in the nature of assumpsit or debt. Thus in Fitch vs. Waite, 5 Conn., 117, 122, it was held that

"The moment of service, is the precise period, when a debt is attached; and if it be then existing, it is secured by the process; but if it does not then exist, no lien is created; as the operation
26 of an attachment, from its nature, is immediate, and not prospective. A future liability is not attachable, for the conclusive reason, that it is not a debt due."

To the same effect is Coburn vs. City of Hartford, 38 Conn., 290, where it was held that there must be an "existing debt" when the attachment is made although it might be payable in the future,

Again in Holcomb vs. Town of Winchester, 52 Conn. 447, it was held

"that the word 'debt' as used in the law of garnishment (as the process is elsewhere usually termed), includes only legal debts, or causes of action for which debt or assumpsit may be maintained."

Such also is Sand-Blast File Sharpening Co. vs. Parsons, 54 Conn. 310, 313, where the Court said that the word "due" as used in the foreign attachment statute imported an existing obligation and that where there is a condition precedent to the liability there is not existing indebtedness which can be garnishe-d.

Another instructive case is Cunningham Lumber Co. vs. N. Y., N. H. & H. R. R. Co., 77 Conn. 628. That was the case of a written contract for labor and materials which made no provision as to the time of payment and in which nothing was due until the contract was performed;—it was held that there was nothing to attach until the contract was performed.

And in the very recent case of Ransom vs. Bidwell, 89 Conn. 137, 140, there is a definite recognition of the principle that the obligation of the garnishee must be certain as to the liability to pay although the amount of the indebtedness is one which can be
27 fairly investigated and determined in an action of scire facias based upon the attachment already made.

In line with the precedents cited are Woodruff vs. Bacon, 35 Conn. 97; Candee vs. Skinner, 40 Conn. 464; Phœnix Insurance Co. vs. Carey, 80 Conn. 426, and Cox vs. Cronan, 82 Conn. 175, 176. The general conclusion of law to be drawn from these decisions is, that unless a garnishee (in the absence of an express contract to pay interest) has mingled the money attached in his hands with his own, he cannot be required to pay interest on it,—but if he has, the interest may be attached as an incident to the debt.

And this brings us to the vital question involved:—were these banks (in the absence of an express contract to pay interest) under legal obligation to pay these depositors interest on their deposits as an incident of the deposit, and was there any legal remedy open to the depositors at the time of the attachments to enforce such obligation? In my opinion each of these questions must be answered in the negative. Savings banks, as they exist in Connecticut, are held to be incorporated agencies of the depositors for their benefit, and a person making a deposit in a savings bank becomes substantially a part owner of all the assets of the bank. This was held in Osborn vs. Byrne, 43 Conn. 155, 160, where it was said that a savings bank is an incorporated agency for receiving and loaning money on account of the owners; it has no stock and no capital, and is merely a place of deposit where money can be left to remain or be taken out at the pleasure of the owner, and that

"the depositors in savings banks bear the same relation to each other and to the assets of the bank that stockholders in other mone-
28 tary institutions do to each other and to the property of the bank."

A like view of the subject is taken in Coite vs. Society for Savings, 32 Conn. 173; Bunnell vs. Collinsville Savings Society, 38 Conn., 203, and Price vs. Society for Savings, 64 Conn. 362, 366.

Interest was not due the depositors of the banks named as garnishees until declared,—either under their charters or the statutes of Connecticut limiting the rate of dividends payable to depositors,—Revision of 1902, Sections 3440, 3441, and 3442. These Sections which were enacted for the protection of depositors—Bank Commissioners vs. Watertown Savings Bank, 81 Conn. 261,—are as follows:—

"S. 3440. Dividends. The net income of any savings bank, in excess of one-eighth of one per cent. of its deposits, actually earned during the six months last preceding, and no more, may be semi-annually divided among its depositors. No dividend shall exceed a rate of four per cent. per annum, except as provided in S. 3441."

"S. 3441. Surplus. No savings bank shall make any dividend, except as provided in S. 3440, until its surplus shall have accumulated to an amount equal to three per cent. of its deposits. Such surplus shall be kept as a contingent fund; but no savings bank shall carry to its contingent fund more than ten per cent. of its deposits; and any surplus beyond that amount shall be divided among the depositors entitled to such dividends, in sums of not less than one per cent. of its deposits."

"S. 3442. Discrimination in Dividends. In declaring dividends the directors of savings banks shall have power to discrim-
29 inate between deposits of one thousand dollars or less, and those over that sum. Such discrimination shall not exceed one per cent. per annum, and if, at any time, a discrimination becomes necessary, it shall be made in favor of those deposits which are less than one thousand dollars."

This interest is in the nature of a dividend,—in fact it is a dividend and is expressly treated as such by the statutes quoted, and until declared in the way pointed out by the statutes (in the absence of a contract) it is not a debt which may be collected by legal proceedings in the nature of assumpsit or debt. The only remedy of a depositor for the unlawful neglect of the trustees of a savings bank to declare a dividend which had been earned would clearly seem, as in the case of a corporation with capital stock, to be an equitable proceeding to compel the trustees to declare a dividend, as distinct from and separate from the fund upon which it is declared, and until that is done it cannot and does not become the individual property of the depositor. This principle is clearly recognized in Lippitt vs. Thamas Loan & Trust Company, 88 Conn. 185,—the case of a receivership of a trust company with a savings bank department,—where in the course of the opinion at page 207, the court said,—

"As we understand the facts of this case, the several savings department depositors have not made their deposits upon a special contract to pay them a stated rate of interest. If our understanding be correct, the savings department depositors are not entitled to

interest or to dividends upon their deposits beyond the last declaration of dividend."

30 Clearly, in the light of the authorities cited, the attaching creditors acquired no more or greater rights than the depositors held at the time of the attachments. If, through defalcation or unfortunate investments or depreciation of securities, the assets of a savings bank become so impaired that the trustees could not legally declare the dividends, the depositors would share in the loss and would have no remedy either in law or equity to compel the payment of dividends,—authorities supra,—and if in such case they would be without a remedy, I fail to see how the attaching creditors acquire any rights by virtue of these attachments. The liability to pay the dividend was clearly subject to a condition precedent.

My conclusion therefore is,—that all interest accruing after the attachments belongs to the assignee by virtue of the assignments and not to the attaching creditors.

Let an order be drawn in accordance with this opinion.

31 *Bill of Exceptions.*

United States District Court, District of Connecticut, December Term, 1915.

No. 1807. Law.

DIETRICH E. LOEWE, as Surviving Partner of the Firm of D. E. Loewe & Co., Plaintiff,

vs.

THE SAVINGS BANK OF DANBURY, Defendant.

NEW HAVEN, CONN., December 23rd, 1915.

Before Hon. Edwin S. Thomas, Judge.

Appearances:

For the plaintiff: Daniel Davenport, Esq., Bridgeport, Conn.; Walter Gordon Merritt, Esq., New York City.

For the Defendant, The Savings Bank of Danbury, J. Moss Ives, Esq., of Danbury, Conn.

For the United Hatters of North America: William F. Tammany, Esq., of South Norwalk, Conn., and Martin Cunningham, Esq., of Danbury, Conn.

32 Hearing on damages after default by defendant, The Savings Bank of Danbury. Subsequent to default and on motion of the defendant, notice was given to the United Hatters of North America, and said United Hatters of North America appeared and answered as on file.

Martin Fuchs, one of the original plaintiffs and a copartner in

the firm of D. E. Loewe & Co., having died and his death having been duly noted on the record, this action is continued by Dietrich E. Loewe as surviving partner of the firm of D. E. Loewe & Co.

Agreed Statement of Facts.

1. That the allegations of the paragraphs of the complaint numbered 1, 2, 3, 4, 5, 6 and 8 are true, and the allegations of paragraph 7 of the complaint are true except that the aggregate amount of the moneys so owned and possessed by the defendants as therein alleged was $18,461.54.

2. That the said sums of money so attached were savings bank deposits which the defendant held for the depositors under the terms of its charter which provided as follows:

"Sec. 3. All deposits of money received by said corporation shall be used and improved to the best advantage, by loaning the same, in a manner not inconsistent with the laws of this state; or by investing the same by purchase in bank stock or any other public stock of any state, and disposing of the same as the interest of said corporation may require; and the income or profits thereof shall be applied as dividends among the persons making the deposits, their executors and administrators, in just proportion, with such reasonable reduction as may be chargeable thereon. And the principal sums
33 of such deposits may be withdrawn by the owners thereof, or by any other person or persons duly authorized for that purpose, on giving notice of such intention in writing, and lodging the same with the secretary of said corporation at least four months previous to such withdrawal."

3. That after said writ was left in service and said attachment had been made, the United Hatters purchased the said attached estate from the original defendants named in Paragraph 1 of the complaint herein, whose estate had been so attached, and paid said defendants full value therefor, and said estate was duly transferred by said defendants to said United Hatters, and notice thereof was given to the defendant herein, and the said transferee thereupon became the equitable and bona fide owner of said estate, subject to the rights of the plaintiff acquired by virtue of said attachment.

4. That since said attachment, the defendant herein has, in accordance with the terms of its charter, used and improved the moneys so deposited with it, and has regularly declared dividends upon said several deposits payable from the income and profits earned by the defendant from these and its other deposits and that the aggregate amount of dividends so declared upon the several deposits levied upon by said writ of attachment is $11,278.13.

5. That subsequent to the commencement of this action, the defendant on June 26th, 1915, with the consent of the United Hatters paid to the plaintiff $17,558.37 and on July 8th, 1915, the further sum of $474.65 on account of the principal of said deposits so levied upon.

34 6. That there is still due and owing to the plaintiff on account of the principal of said attached deposits, the sum of $428.52.

Mr. Merritt: I ask your Honor to find that plaintiff is entitled to recover of the defendant the sum of $428.52, the amount of the principal of said attached deposits remaining unpaid.

The Court: I so find.

Mr. Merritt: I ask your Honor to rule and find as a conclusion of law, that the plaintiff is entitled to recover of the defendant the dividends or interest, amounting in all to $11,278.13, which accrued on said attached deposits subsequent to the attachment.

The Court: I decline to so find, but find on the contrary that the plaintiff is not entitled to recover said interest and dividends and that said interest and dividends are not covered by the attachment.

Mr. Merritt: We except to this ruling by your Honor.

Mr. Merritt: I ask your Honor to rule and find as a conclusion of law, that if the plaintiff is not entitled to recover said dividends declared by said Savings Bank upon said attached deposits, that he is entitled to recover 6% interest on said attached deposits from date of attachment, because said deposits have been mingled by the defendant with its own funds and the defendant has made profits thereon.

The Court: I decline to so rule, and find that the plaintiff is not entitled to recover interest on account of said attached deposits in any form.

Mr. Merritt: We except to your Honor's ruling.

35 Mr. Merritt: I ask your Honor to rule and find as a conclusion of law, that 6% interest from the date of the Marshal's demand on December 24th, 1912, should be allowed the plaintiff, such interest to be computed on the full amount credited to the attached estate on that date, including all interest or dividends to that date.

The Court: I refuse to so find.

Mr. Merritt: We except to your Honor's ruling and refusal to find.

Mr. Merritt: I ask your Honor to rule and find as a conclusion of law, that the plaintiff is entitled to recover 6% interest from the date of the Marshal's demand on December 24th, 1912, such interest to be computed upon the principal of the said attached estate as of the date of attachment.

The Court: I decline to so rule.

Mr. Merritt: We except to your Honor's ruling and refusal to find.

And now, in furtherance of justice and that right may be done, the plaintiff presents the foregoing as his bill of exceptions in this cause and prays that the same may be settled and allowed, and signed, sealed and certified by the Judge, as provided by law, and the Court does hereby sign and seal the same.

EDWIN S. THOMAS, *Judge.*

New Haven, Conn., Feb'y 22, 1916.

36 District Court of the United States for the District of Connecticut.

No. 1807. Law.

DIETRICH E. LOEWE, as Surviving Partner of the Firm of D. E. Loewe & Co., Plaintiff,

vs.

THE SAVINGS BANK OF DANBURY, Defendant.

Petition for Writ of Error and Order Allowing the Same.

Now comes the plaintiff in the above-entitled cause, Dietrich E. Loewe, as surviving partner of the firm of D. E. Loewe & Co., and says that on or about the 22nd day of February, 1916, final judgment was rendered against the defendant and in favor of the plaintiff herein, to recover of the defendant the sum of Four hundred twenty-eight and 52/100th dollars ($428.52), and his costs and disbursements taxed and allowed at the further sum of — dollars and — cents ($—).

That in said judgment and the proceedings herein had prior thereto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which are on file with this petition.

Therefore, the plaintiff prays an order of this Court allow-
37 ing this plaintiff to prosecute a writ of error to the Honorable United States Circuit Court of Appeals, for the Second Circuit, and that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Second Circuit, for the correction of errors so complained of and in accordance with the laws of the United States in that behalf made and provided, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Second Circuit.

DANIEL DAVENPORT,
WALTER GORDON MERRITT,
Attorneys for Plaintiff.

It is ordered that the writ of error above prayed for be allowed this 24th day of February, 1916.

EDWIN S. THOMAS,
United States District Judge.

Endorsed: Filed 24th Feb., 1916. Charles Elliott Pickett, Clerk.

38 District Court of the United States for the District of Connecticut.

No. 1807. Law.

DIETRICH E. LOEWE, as Surviving Partner of the Firm of D. E. Loewe & Co., Plaintiff,

vs.

THE SAVINGS BANK OF DANBURY, Defendant.

Assignment of Errors and Prayer for Reversal.

Simultaneously with the filing of his petition for a writ of error, the plaintiff herewith files the following assignment of errors which he avers occurred upon the trial of this action and in the rendition of judgment therein:

1. That the Court erred in refusing to rule that the plaintiff was entitled to recover of the defendant the dividends or interest, amounting in all to $11,278.13 which accrued on the attached bank deposits subsequent to the attachment.

2. That the Court erred in refusing to rule that the plaintiff was entitled to recover six per cent. interest on the attached bank accounts from the date of attachment.

3. That the Court erred in refusing to rule that the plain-
39 tiff was entitled to recover six per cent. interest on said attached bank accounts from the date of the Marshal's demand on December 24th, 1912.

4. That the Court erred in refusing to rule that the plaintiff was entitled to recover six per cent. interest on the attached bank accounts from the date of the Marshal's demand on December 24th, 1912, such interest to be computed upon the principal of the said attached estate as of the date of attachment.

5. That the Court erred in refusing to allow the plaintiff interest in any form on said attached bank accounts.

6. That the Court erred in refusing to allow interest on said attached accounts in the judgment herein.

Wherefore, the plaintiff in error prays that the judgment herein be reversed and that judgment be directed in favor of the plaintiff in error against the defendant in error for the amount of the principal of said attached bank accounts remaining unpaid, and interest on all of the attached bank accounts from the date of attachment.

Dated, New York, February 24th, 1916.

DANIEL DAVENPORT,
WALTER GORDON MERRITT,
Attorneys for Plaintiff.

Endorsed: Filed 24th Feb., 1916. Charles Elliott Pickett, Clerk.

40 *Allowance of Writ of Error.*

District Court of the United States for the District of Connecticut.

No. 1807. Law.

DIETRICH E. LOEWE, as Surviving Partner of the Firm of D. E. Loewe & Co., Plaintiff,

vs.

THE SAVINGS BANK OF DANBURY, Defendant.

On this 24th day of February, 1916, came the plaintiff, Dietrich E. Loewe, as surviving partner of the firm of D. E. Loewe & Co., by his attorneys, Daniel Davenport and Walter Gordon Merritt, and filed herein and presented to the Court his petition for the allowance of a writ of error, together with an assignment of errors intended by him to be urged, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Now, in consideration thereof and upon the stipulation of the defendant annexed hereto which waives the giving of any bond upon this writ of error, the Court does allow the writ of error.

EDWIN S. THOMAS,
U. S. D. J.

Endorsed: Filed 24th Feb., 1916. Charles Elliott Pickett, Clerk.

41 *Stipulation.*

District Court of the United States for the District of Connecticut.

No. 1807. Law.

DIETRICH E. LOEWE, as Surviving Partner of the Firm of D. E. Loewe & Co., Plaintiff,

vs.

THE SAVINGS BANK OF DANBURY, Defendant.

It is hereby stipulated and agreed that the writ of error in the above-entitled action may be prosecuted by the plaintiff without furnishing a bond, and that the plaintiff need furnish no bond for costs.

WALTER GORDON MERRITT,
Attorney for Plaintiff.

J. MOSS IVES,
Attorney for Defendant.

Citation on Writ of Error.

By the Hon. Edwin S. Thomas, Judge of the District Court of the United States for the District of Connecticut, in the Second Circuit, to the Savings Bank of Danbury, Greeting:

You are hereby cited and admonished to be and appear
42 before the United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the Circuit above stated, on the ninth day of March, 1916, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States, for the District of Connecticut, wherein Dietrich E. Loewe, as surviving partner of the firm of D. E. Loewe & Co., is plaintiff, and you are defendant, to show cause, if any there be, why judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the City of New Haven, in the District of Connecticut, and the Second Circuit, this 24th day of February, in the year of our Lord, one thousand nine hundred and sixteen and of the Independence of the United States the One hundred and fortieth.

EDWIN S. THOMAS,
Judge of the District Court of the United States for the District of Connecticut, in the Second Circuit.

Due and lawful service of the foregoing citation is hereby acknowledged and accepted.

J. MOSS IVES,
Attorney for Defendant.
WILLIAM F. TAMMANY,
Attorney for United Hatters of North America.

Endorsed: Filed 24th Feb., 1916. Charles Elliott Pickett, Clerk.

43 *Stipulation.*

District Court of the United States for the District of Connecticut.

No. 1807. Law.

DIETRICH E. LOEWE, as Surviving Partner of the Firm of D. E. Loewe & Co., Plaintiff,
vs.
THE SAVINGS BANK OF DANBURY, Defendant.

It is hereby stipulated, that the foregoing is a true and correct transcript of the writ and complaint, appearance, default, motion to cite in United Hatters of North America, and for hearing on dam-

ages, order, answer of United Hatters of North America, judgment, bill of exceptions, papers on writ of error, and the opinion of the Trial Court, and of the whole thereof, made up to be transmitted to the United States Circuit Court of Appeals for the Second Circuit, on writ of error of the plaintiff in the above-entitled action, and certification thereof by the Clerk of the District Court is hereby waived.

And it is consented that these papers may be filed and used herein as the transcript of the record on error in the above-entitled action.

Dated, Danbury, Conn., March —, 1916.

WALTER GORDON MERRITT,
Attorney for Plaintiff in Error.
J. MOSS IVES,
Attorney for Defendant in Error.
WILLIAM F. TAMMANY,
Attorney for United Hatters of North America.

44 *Clerk's Certificate to Record.*

UNITED STATES OF AMERICA,
District of Connecticut, City of Hartford, ss:

I, Charles E. Pickett, Clerk of the District Court of the United States of America, for the District of Connecticut, for the Second Circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing is a correct transcript of the record and proceedings had in said Court in the cause of Dietrich E. Loewe, as surviving partner of the firm of D. E. Loewe & Co., Plaintiff-in-Error, versus The Savings Bank of Danbury, Defendant-in-Error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereto fixed at the City of Hartford, in the District of Connecticut, in the Second Circuit, this 8th day of March, in the year of our Lord, One thousand nine hundred and sixteen, and of the Independence of the United States the One hundred and fortieth.

[L. S.] CHARLES E. PICKETT, *Clerk.*

45 United States Circuit Court of Appeals for the Second Circuit.

DIETRICH E. LOEWE, as Surviving Partner of the Firm of D. E. LOEWE & COMPANY, Plaintiff in Error,
against
THE SAVINGS BANK OF DANBURY, Defendant in Error.

Before Coxe and Rogers, Circuit Judges, and Augustus N. Hand, District Judge.

Daniel Davenport, Walter Gordon Merritt, Attorneys for Plaintiff-in-Error;
John H. Light, John R. Booth, J. Moss Ives, Attorneys for Defendant-in-Error.

This cause comes here on writ of error to the District Court of the United States for the District of Connecticut.

ROGERS, *Circuit Judge:*

An action was commenced by the present plaintiff and others in the Circuit Court of the United States for the District of Connecticut thirteen years ago to recover damages from the members of a trade union charged with conspiracy in restraint of interstate commerce. The questions involved were before that court at various times,
46 and were before this court on several occasions, and were three times before the Supreme Court of the United States. The plaintiffs were manufacturers of hats at Danbury, Connecticut, where they maintained a factory. The defendants in the original suit were members of a combination called The United Hatters of North America and they were charged with being in a conspiracy to compel the plaintiffs to unionize their factory. The Supreme Court in Loewe v. Lawler, 208 U. S. 274 (1907) sustained the right to maintain the action. In 1912 the Supreme Court refused a writ of certiorari, and in 235 U. S. 522 (1915) that court affirming the decision of this court in 209 Fed. 721 (1913) sustained a judgment rendered against the defendants in that action in the sum of $353,130.90.

When the action above referred to, known as the Danbury Hatters' case, was commenced a writ of attachment was issued dated August 31, 1903, demanding $240,000 damages and costs. The writ directed the United States marshal for the District of Connecticut to attach to the value of $250,000 the goods and estate of over 150 named defendants and it was duly served upon them and upon the Savings Bank of Danbury, defendant herein, "as agent, trustee and debtor of and to each of the aforesaid persons named therein as defendants."

The process under which the money deposited in the Savings Bank was attached was issued under section 880 of the General Statutes of Connecticut, Revision of 1902, which reads as follows:

"When the effects of the defendant, in any civil action in which judgment or decree for the payment of money may be rendered, are concealed in the hands of his agent or trustee so that they cannot be

found or attached, or where a debt is due from any person to such defendant, or where any debt, legacy or distributive share is, or may become due to such defendant from the estate of any deceased
47 person or insolvent debtor, the plaintiff may insert in his writ, a direction to the officer to leave a true and attested copy thereof, and of the accompanying complaint, at least twelve days before the session of the court to which it is returnable, with such agent, trustee or debtor of the defendant, or as the case may be, with the executor, administrator or trustee of such estate, or at the usual place of abode of such garnishee and from the time of leaving such copy, all the effects of the defendant in the hands of any such garnishee, and any debt due from any such garnishee, to the defendant, and any debt, legacy or distributive share, due or that may become due to him from such executor, administrator or trustee in insolvency, not exempt from execution, shall be secured in the hands of such garnishee to pay such judgment as the plaintiff may recover."

When the judgment was obtained in the main action an execution was taken out and put into the hands of the marshal, who acting by the direction of the plaintiffs, made demand upon the Savings Bank of Danbury, the defendant herein, as agent, trustee and debtor of and to each of the judgment debtors severally of the sums named in the execution and of any estate of each of the several judgment debtors severally. This demand the Savings Bank refused to comply with, although at the time it was served it was indebted to each of the defendants severally in various amounts which it refused at the time to disclose. At the time the marshal made his demand the Savings Bank had on deposit $18,461.54 to the credit of various of the defendants. The execution was returned wholly unsatisfied.

An action in scire facias was then brought pursuant to section 931 of the General Statutes of Connecticut, Revision of 1902, to recover attached Savings Bank accounts levied upon by the writ of attachment above mentioned. Section 931 reads as follows:

"If judgment be rendered in favor of the plaintiff in any action by foreign attachment all the effects in the hands of the garnishee at the time of the attachment or debts then due from him to the defendant, and any debt, legacy, or distributive share, due or
48 to become due to the defendant from any garnishee as an executor, administrator or trustee, shall be liable for the payment of such judgment; and the plaintiff, on praying out an execution, may direct the officer serving the same, to make demand of such garnishee for the effects of the defendant in his hands, and for the payment of any debt due to the defendant, and such garnishee shall pay said debt or produce said effects, to be taken and applied on said execution; and if he shall have in any manner disposed of the effects of the principal in his hands when the copy of the writ was left with him, or shall not expose or subject them to be taken on the execution, or shall not pay to the officer, when demanded, the debt due to the defendant at the time the copy of the writ was left with him, such garnishee shall be liable to satisfy such judgment out of his own estate, as his proper debt, if the effects or debt be of sufficient value or amount, if not, then to the value of such effects or to the amount of such debt. A scire facias may be taken

out from the clerk of the court where judgment was rendered to be served upon such garnishee, requiring him to appear before such court and show cause, if he have any, to the contrary; and the plaintiff may require the defendant, and the defendant shall have the right to disclose, on oath, whether he had any of the effects of the debtor in his hands, or is indebted to him; and the parties may introduce any other proper testimony respecting such effects. If it be found that the defendant has the effects of such debtor in his hands, or is indebted to him, or if he makes default of appearance, or refuses to disclose on oath, judgment shall be rendered against him as for his own debt to be paid out of his own estate, with costs; but if it appear on the trial, that the effects are of less value, or the debt of less amount than the judgment recovered against the debtor, judgment shall be rendered to the value of the goods or to the amount of the debt; and if it appears that the defendant has no effects of such debtor in his hands, or is not indebted to him, he shall recover costs."

And Congress in 1872 provided as follows:

"In common law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process; Provided, That similar preliminary affidavits or proofs and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy."

No question has been raised but that the action is one which the plaintiff is entitled to bring under the law of Connecticut and of the United States.

49 It appears that in December 1903, after the attachment of the deposits in the Savings Bank and before the rendition of final judgment in the original action, the defendants in that action assigned to the United Hatters of North America, a voluntary association having an office or principal place of business in the City and State of New York, the dividends or interest accruing on said deposits and which were declared after the attachment.

The United Hatters of North America was given notice of the pendency of the proceedings according to the terms of the Connecticut statute under which the proceeding was instituted, and it appeared and filed an answer in which it alleged that the dividends or interest accruing and declared subsequent to the original attachment were not held by the attachment but passed to it and became its property by virtue of the assignments. The United Hatters notified the Savings Bank that it claimed to own the dividends declared or the interest due on such accounts and demanded payment of the same which payment was refused.

It is admitted that at the time of the attachment the amount held in the Savings Bank account to the credit of the various defendants in the original action amounted to $18,461.54. And the District Judge has found that subsequent to the commencement of the pres-

ent proceeding the defendant with the consent of The United Hatters paid to the plaintiff $17,558.37, on June 26, 1915, and the further sum of $474.65 on account of the principal of said deposits.

The important question involved is whether the interest or dividends which have accumulated in the hands of the defendant and which would belong to the depositors but for the assignment, belong to the judgment creditor by virtue of the original attachment, or to the assignee of the fund by virtue of the assignment made after the attachment.

It is understood that similar actions are pending, brought by the plaintiff against other savings banks in Connecticut, involving the same issue and that the parties have stipulated that the judgment in those actions is to be controlled by the decision in this suit. The accumulated dividends on the various deposits in the various actions are said to amount to about $20,000.

The District Judge came to the conclusion that the attaching creditor was not entitled to the interest or dividends but that the same belonged to the United Hatters as assignee. He accordingly gave judgment to the plaintiff in the sum of $428.52 that being the amount of the principal which it is admitted remained unpaid in the hands of the Savings Bank of Danbury, the defendant in the action.

The attachments of the deposits in the Savings Bank was a proceeding unknown to the common law. In Haber v. Nassitts, 12 Fla. 589, 608, the Supreme Court of Florida declares that:

"No such process was known at common law and the proceeding is traced to a custom of London whereby 'if a plaint was affirmed and returned nihil,' the plaintiff had a garnishment against debtors of the defendant, and after certain proceedings was entitled to judgment."

However that may be the remedy by attachment in this country owes its existence entirely to statutory enactment. In Penoyer v. Kelsey, 150 N. Y. 77 (1896), the New York Court of Appeals in speaking of the remedy by attachment says: "It exists, as a provisional remedy, only when authorized by statute, and as such is comparatively recent in its origin." And see Ganse v. Cone, 73 Texas 241 (1889); Hubbell v. Kingman, 52 Conn. 19 (1884); Kittredge v. Bellows, 7 N. H. 399; Baldwin v. Flagg, 43 N. J. L. 495. But in Mack v. Parks, 74 Mass. 517 (1857) the court said:

"Our system of attachment on mesne process was derived from the ancient rule of the common law, by which as part of the service of civil process, goods which were properly subject to distress were allowed also to be taken by a species of distress, and held as vadii or pledges to compel the appearance of the defendant."

And as the remedy by attachment is statutory the rights of an attaching creditor are governed by the state law as declared by the highest court of the state enacting the statute, and the decisions of that court will be followed by a court of the United States having jurisdiction of the proceedings. Wolf v. Cook, 40 Fed. 432 (1889); Rice v. Alder-Goldman Commission Co., 71 Fed. 151 (1895); L.

Bucki & Son Lumber Co. v. Fidelity & Deposit Company of Maryland, 109 Fed. 393 (1901).

As the remedy by attachment is regarded as being in derogation of the common law the courts have sometimes construed strictly the statutes giving the remedy. Ritchie v. Sayers, 100 Fed. 520; Grigham v. Avery, 48 Vermont 602; Penoyer v. Kelsey, supra. But in a number of the states the statutes themselves expressly provide that they are not to be strictly construed. See C. J. 37. In other states the courts having regard to the intention of the legislatures, have been inclined to adopt a liberal construction independently of express statutory provision. Hannibal &c. R. Co. v. Crane, 102 Ill. 249; Gunby v. Porter, 80 Md. 402; Best v. British &c. Co. 128 N. C. 351; Stock v. Little, 45 Pa. 416; Cole v. Utah Sugar Co., 35 Utah 148. The Connecticut statute once construed strictly, Hubbell v. Kingman, supra, is now liberally construed, Ransom v. Bidwell, 89 Conn. 137 (1915). The policy of the State of Connecticut is declared by its highest court in the above case to be that:

"All the property of a debtor not exempt from execution shall be made subject to the payment of his debts, and that every facility consistent with the reasonable immunity of the debtor should be afforded to subject such property to legal process."

52 Under such statutes as that in Connecticut it is of course not questioned but that a creditor of a depositor in a Savings Bank can attach the deposit. A bank is bound to respect such process and the courts do not permit it to apply the fund attached to the payment of any debt due from the depositor to any one. Bolles on Modern Law of Banking, volume 2, page 778. The difficulty arises when the fund so deposited is upon interest and it becomes necessary to determine whether the attachment binds interest thereafter accruing. The District Judge thought it did not. He fully recognized the principle that the question should be governed by the decisions of the Connecticut court so far as those decisions throw light upon the subject. He reviewed at some length the decisions in that State. There are a number of cases in which the Connecticut court has decided that attaching creditors acquire no more or greater rights than the depositors had at the time of the attachments, and he therefore concluded that all interest accruing after the attachment belonged to the assignee by virtue of the assignment and not to the attaching creditors.

But the exact question presented in this action has never been presented to the Supreme Court of the State of Connecticut. That court has held that under the foreign attachment statute of that State there is no right to attach unless there is an existing obligation or debt due, and that where there is a condition precedent to the liability there is not an existing indebtedness which can be garnisheed. See Fitch v. Eaite, 5 Conn. 117 (1823); Coburn v. City of Hartford, 38 Conn. 290 (1871); Holcomb v. Town of Winchester, 52 Conn. 447 (1883); Sand-Blast File-Sharpen-

53 ing Co. v. Parsons, 54 Conn. 310 (1886); Cunningham Lumber Co. v. N. Y., N. H. & H. R. R. Co., 77 Conn. 628 (1905). These decisions, however, are not conclusive of the question involved in the present action. Not only is the question one

upon which the Connecticut courts have not passed, but it is one upon which there seems to be little authority. While it is true that under the Connecticut decisions it is the existing obligation or the debt due which is bound by the attachment, and that at the time the attachment was served the dividends in question had not been declared and were not in existence, nevertheless they would be subject to the attachment if they are to be considered a necessary incident of the deposits. For whatever binds the principal binds that which is inseparable from the principal. An attachment of a freehold, for example, would give a lien on the timber trees and on the buildings attached thereto. In Coke on Littleton, 151 *b*, it is said that a thing is "incident to another when it appertains to, or follows on that other which is more worthy or principal." The lexicographers say that an "incident" is a thing that is necessarily or inseparately connected with another. That it is something characteristically, naturally, or legally depending upon, connected with or contained in another thing as its principal. Webster says that it is something necessarily appertaining to or depending on another, which is termed the principal. So that the question is whether the "dividends" on these deposits so appertained to and were so connected with the latter that the attachment of the deposits created a lien on the deposits and the dividends including those subsequently declared. In Shinn on Attachment and
54 Garnishment (1896) volume 1, section 316, pages 609, 610, that writer says:

"Whether or not the rents and profits accruing upon the attached property are subject to the attachment lien cannot be said to be judicially ascertained."

In Cook on Corporations, 7th edition, (1913) volume 2, section 484, page 1359, that writer says that: "Dividends on the stock which is attached follow the stock and are covered by the attachment."

In Jacobus v. Monongahela National Bank, 35 Fed. 395 (1888), a case in a United States District Court, a creditor attached shares of stock in a railroad company, the shares standing in the name of Jacobus, and when the railroad company and Jacobus were summoned as garnishees, Jacobus pleaded nulla bona and the railroad company pleaded that the stock belonged to Jacobus. The original case was decided in 1883 by the Supreme Court of the United States (109 U. S. 275) in favor of the garnishees. It appears that at the time the attachment was served, the railroad company had in its hands a dividend of $264 on said stock, and from time to time thereafter twenty-one other dividends of $264 each were declared and all said dividends were retained by said railroad company until the decision by the Supreme Court, when the railroad company paid the money to Jacobus without interest. Suit was then brought on the recognizance furnished by the bank to pay damages caused by the attachment, and the question arose as to whether the attachment compelled the railroad company to withhold the payment of subsequent dividends. The court held that the attaching creditor was entitled to the dividends and said:

"The dividends were but an incident to the stock—the mere fruits thereof—and were as much within the grasp of the attachment as the corpus of the stock was."

55 In Moore v. Gennett, 2 Tenn. Ch. 375 (1875) Chancellor Cooper in an attachment case said that:

"Dividends are as much an incident to the stock as rent is to the reversion of land, or interest to a debt."

He added:

"Besides, the increase or income of property, after the levy of an attachment, is given to the creditor by the Code, section 3536."

The connection clearly shows that in his opinion the provision of the Code was merely declaratory of what the law would have been without the Code.

In Syracuse City Bank v. Coville, 19 How, Pr. (N. Y.) 385 (1860) the court held that where an attachment issued and was levied on a money bond payable in installments and at the time only one installment was due, the creditor only acquired a lien on the amount actually due upon the bond at the time of service of the writ. The case is distinguishable from the case of Jacobus v. Monongahela National Bank, supra, and is not to be regarded as controverting it in the least. What was attached in the Syracuse City Bank case was the debt due at the time of the levy. The debts due on the subsequent installments were not incidents of the debt attached but were wholly independent thereof.

In the case under consideration the property attached was not stock but deposits in the Savings Bank. Now a savings bank is conducted solely for the benefit of its depositors. It receives deposits and loans them for their benefit. And a Savings Bank is conducted solely for the benefit of the depositors and in which the profits after deducting necessary expenses inure wholly to the benefit of the depositors, does not stand in the relation of a debtor to a creditor as does an ordinary bank to its depositors. Its re-

56 lation is more nearly that of trustee and cestui que trust. State v. People's National Bank, 75 N. H. 27. The depositors intrust their money to the bank as their trustee to keep and invest the same according to the charter and the laws. If there is a profit they receive it, if there is a loss they share it according to the amount of their deposits. In Cary v. Savings Union, 22 Wall. 38 (1874), the Supreme Court held that the share of profits paid by a Savings bank to its depositors constituted "dividends". Chief Justice Fuller wrote the opinion in the course of which he said:

"The interest received for the loan of each deposit was not kept by itself, and paid to the depositors after deducting a charge to cover expenses, but all was placed in a common fund, and when the net result of the business was ascertained, that was divided among the several contributors according to the value of their contributions. Such a division clearly produces a dividend according to the understanding of that term."

The question in the case was whether the share of the profits paid a depositor was to be considered as "interest" or as "dividends".

But that was a case where the Savings bank had a capital stock and a reserve fund and under its charter the directors at the expiration of every six months after deducting certain salaries and expenses, would set apart a certain proportion of the profits, not exceeding one-tenth, to the stockholders as a compensation for furnishing the capital. "Although a bank may be called a savings bank, if it is really a stockholders' bank, where the capital is owned by the shareholders, the name will amount to nothing," as said in 2 Morse, section 618. The mere designation of a bank as a savings bank does not make it one. To determine its true character, its organization, powers and mode of doing business must be considered. 3 R. C. L. page 694. And the record in this case does not
57 disclose the organization, powers and mode of doing business of the Danbury Savings Bank. We do not know whether it had a capital stock or not. If it did not have but held the deposits as a trustee and not as a debtor, the plaintiff could still attach them. The law is clear that if a trustee has funds in his hands belonging to the cestui que trust they are liable to foreign attachment. Easterly v. Keney, 36 Conn. 18 (1869). Whether the income funds so held produce "dividends" in a technical sense is not important to the decision of this case, such income being, in our opinion, an incident of the deposits in either case.

The matter may be considered from another view point. In Mattingly v. Boyd, 20 How. 128 (1857) the Supreme Court said that:

"As a general rule, a garnishee is not bound to pay interest, because he is liable to be called on to pay at all times. (11 Sargent & Rawle 188; Drake Pr. 725; 1 Washington V. R. 149)."

Undoubtedly what the court referred to was not the interest due from a debtor to a creditor at the time of the service of the process, but interest on the money thereafter. And in that case while acknowledging the general rule to be as stated the garnishee was charged with interest from the time when the attachment process was served for the reason that he had used the money, and interest was charged from October 23, 1827 when process was served to August 25, 1851.

In Woodruff v. Bacon, 35 Conn. 97 (1868) the Supreme Court of Connecticut applied the same principle to a case in which the garnishee had used the fund. The court said:

"But we cannot recognize the principle that should allow the the plaintiffs to recover the debt and not allow them to recover the interest which is the mere incident to the debt arising from the defendant's use of it."

So in Cox v. Cronan, 82 Conn. 176 (1909) the same court said:

58 "When money belonging to a defendant is attached in the hands of a third party by process of foreign attachment, the garnishee cannot safely pay it over to either party pending the continuance of the suit in which it is attached, but must hold it to abide the result of the action. If he is not under contract to pay interest, and makes no use of the money, but retains it as a

mere stakeholder, he will not be liable for interest until the result of the suit determines to which party he shall pay it. Candee v. Skinner, 40 Conn. 464; Phœnix Ins. Co. v. Carey, 80 Id. 426, 432; 68 Atl. 993. But when he mingles the money attached with his own and has the use of it, he is liable for the interest on it."

In American & English Encyclopedia of Law, 837, 838, the rule is laid down as follows:

"It is well settled that a garnishee is liable to the plaintiff for interest on the amount of his indebtedness to the defendant during the pending of the garnishment proceedings if he had promised the defendant to pay interest or if he received interest or used the money during that time."

In 22 Cyc. 1559, 1560, the rule is stated as follows:

"Attachment or Garnishment.—(1) In General. Where interest upon a debt is recoverable as damages, and not by reason of a contract to pay it, the debtor is not usually liable for interest during a period in which he is prevented from making payment by reason of the debt being attached or garnished in his hand by some third person, or by the debtor being summoned as a trustee of the creditor under trustee process. But if the contract on which the debt is founded draws interest during the time payment is thus delayed interest will not be suspended. If a debtor against whom trustee or garnishment proceedings are issued causes unreasonable delay in making his answer thereto or otherwise for the purpose of obtaining a longer use of the money, or falsely denies his indebtedness, he will be liable for interest during the pendency of the proceedings. (II) Use of funds by garnishee. If a garnishee, during the pendency of the proceedings, employes the funds in his hands so as to derive a profit therefrom, he will generally be held to account for interest."

In Bassett v. Kinney, 24 Conn. 267 (1855) the court held that a person to whom money is intrusted to be paid over to a designated recipient, and who deposits the money in bank for some time, afterward paying it over to the person entitled to receive it, is liable to such person for the interest paid to him, on the money
59 while deposited in the bank, although such interest is paid after the money has been turned over. Where it affirmatively appears that the funds have been profitably employed and the principle has been augmented by virtue of such profitable employment, the principle and the increment are inseparable and belong to the attaching creditor. If the attached fund, in this case the deposits, produces earnings during the period of the attachment, those earnings are an incident of the attached fund and subject to the lien. It makes no difference by what name the earnings may be called, whether interest or dividends. As long as the attached fund is used for profit, the profit whether earned for the benefit of the garnishee or the debtor, is impounded for the benefit of the attaching creditor and is subject to the same ultimate disposition as the principal of which it is the incident. Is it said that in this case the Savings Bank was not using the funds for its own benefit but for the benefit of the depositors? But surely that can-

not help the case for if the argument be sound then this extraordinary result would follow—that a person garnisheed could not use the attached funds for his own benefit without being chargeable with interest, but he could use them for the benefit of the debtor defendant who is being pursued by the attaching creditor and if he did the defendant and not the attaching creditor would be entitled to the accumulated interest. A principle leading to such an unjust and irrational result cannot be sound and need not be further considered.

That the deposits attached were used and earned a profit during the period of litigation is conceded. The court below made the following finding of fact which was embodied in the judgment.

60 "That since that attachment, the defendant herein has, in accordance with the terms of its charter, used and improved the moneys so deposited with it and has regularly declared dividends upon said several deposits payable from the income and profits earned by the defendant from these and its other deposits, and that the aggregate amount of dividends so declared upon the several deposits, levied upon by said writ of attachment, is $11,278.13."

The plaintiff contends that he is entitled to recover six per cent interest from the date of the demand made by the marshal after final judgment on December 24, 1912. The General Statutes of Connecticut, Revision of 1902, section 3440, provide that the net income of Savings banks in excess of one-eighth of one per cent of its deposits, actually earned during the six months last preceding, and no more, may be semi-annually divided among its depositors. It is then added that no dividend shall exceed a rate of four per cent per annum except as provided in section 3441. The plaintiff's claim to six per cent does not rest upon anything in that section, but upon the principle that the refusal to comply with the marshal's demand was wrongful and when one wrongfully withholds money he is chargeable with the legal rate of interest, which in Connecticut is six per cent. At the time the marshal made his demand the interest or dividends were claimed by the United Hatters of North America under the assignment, and the proceeding now under review was instituted to determine the rights of the respective parties. A withholding by the defendant under such circumstances cannot be regarded as unlawful and the interest to be allowed must be limited to the Savings bank rate.

The judgment below must be modified so as to include the dividends declared by the defendant according to law. Those

61 dividends the plaintiff is entitled to recover in addition to the balance of the deposits $428.52, and his costs in both courts.

The judgment so modified is affirmed.

(Endorsed:) United States Circuit Court of Appeals, Second Circuit. Dietrich E. Loewe against The Savings Bank of Danbury. Opinion Rogers, C. J. United States Circuit Court of Appeals, Second Circuit. Filed July 5, 1916. William Parkin, clerk.

62 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the Court-rooms in the Post-office Building in the City of New York, on the 13th day of July, one thousand nine hundred and sixteen.

Present:

Hon. Alfred C. Coxe,
Hon. Henry Wade Rogers,
Circuit Judges;
Augustus N. Hand, District Judge.

DIETRICH E. LOEWE, as Surviving Partner, etc., Plaintiff in Error,
v.
SAVINGS BANK OF DANBURY, Defendant in Error.

Error to the District Court of the United States for the District of Connecticut.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of Connecticut, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is modified in accordance with the opinion of this court
H. W. R. and as so modified is affirmed with costs to the plaintiff in error in both courts.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

63 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. D. E. Loewe vs. Savings Bank of Danbury. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed July 13, 1916. William Parkin, Clerk.

64 In the United States Circuit Court of Appeals for the Second Circuit.

DIETRICH E. LOEWE, as Surviving Partner of the Firm of D. E. Loewe & Co., Plaintiff in Error,
against
THE SAVINGS BANK OF DANBURY, Defendant in Error.

Petition for Writ of Error and Order Allowing Writ.

Now comes the defendant in error in the above entitled cause, The Savings Bank of Danbury, and respectfully shows that a final judgment has been rendered in the above entitled cause by the United States Circuit Court of Appeals for the Second Circuit, on the 5th day of July, 1916, modifying and affirming the judgment of the District Court of the United States for the District of Connecticut

and that the matter in controversy in said suit exceeds $5,000, exclusive of costs and that the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the diversity of citizenship or upon any of the parties being aliens or citizens of different states and this cause does not arise under the Patent Laws, nor the Revenue Laws, nor the Criminal Laws and that it is not an admiralty case and that it necessarily involves the construction and legal effect of a writ of attachment or garnishment issued out of the District Court of the United States for the District of Connecticut, pursuant to the Statutes of the United States in such cases made and provided, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error.

65 That in said judgment as modified by said Circuit Court of Appeals and the previous proceedings had herein, certain errors were committed to the prejudice of the defendant in error, all of which will more in detail appear from the assignment of errors which are on file with this petition.

Therefore the defendant prays an order of this court allowing it to prosecute a writ of error to the Supreme Court of the United States and that a writ of error may issue in this behalf for the correction of the errors so complained of and in accordance with the Laws of the United States in such cases made and provided and that a transcript of the record proceedings and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States and that an order be made herein fixing the amount of security which the defendant shall give and furnish upon said writ of error and upon the giving of such security, all further proceedings in this court be suspended and stayed until the determination of said writ of error in the said Supreme Court of the United States and your petitioner will ever pray.

J. MOSS IVES,
Attorney for Defendant in Error.

It is hereby ordered that the writ of error above prayed for be allowed this 10th day of August, 1916.

ALFRED C. COXE,
Judge of the Circuit Court of Appeals for the Second Circuit.

66 (Endorsed:) United States Circuit Court of Appeals for the Second Circuit. Dietrich E. Loewe, etc., Plaintiff-in-Error, vs. Savings Bank of Danbury. Petition for writ of Error and Order allowing writ. J. Moss Ives, Danbury, Conn., Attorney for Defendant-in-Error. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 11, 1916. William Parkin, Clerk.

67 United States Circuit Court of Appeals for the Second Circuit.

DIETRICH E. LOEWE, as Surviving Partner of the Firm of D. E. Loewe & Company, Plaintiff in Error,

vs.

SAVINGS BANK OF DANBURY, Defendant in Error.

Assignment of Errors and Prayer for Reversal.

Simultaneously with the filing of its petition for a writ of error, the defendant-in-error, the Savings Bank of Danbury, herewith files the following assignment of errors which it avers occurred on the trial of this action and in the rendition of the judgment therein:

1. That the Court erred in holding that the plaintiff-in-error, Dietrich E. Loewe, as surviving partner of the firm of D. E. Loewe & Company, was entitled to recover of the defendant-in-error the interest or dividends, amounting in all to $11,278.13, which accrued on the attached bank accounts subsequent to the attachment or garnishment.

2. That the judgment as modified and affirmed by the United States Circuit Court of Appeals for the Second Circuit, is erroneous in that it awards the plaintiff-in-error, Dietrich E. Loewe, as surviving partner of the firm of D. E. Loewe & Company, the interest or dividends which accrued on the attached bank accounts subsequent to the date of garnishment or attachment.

68 3. That the United States Circuit Court of Appeals for the Second Circuit erred in modifying and affirming the judgment of the District Court so that it adjudged that the plaintiff-in-error, Dietrich E. Loewe, etc., recover of the defendant-in-error, the Savings Bank of Danbury, the interest or dividends which accrued subsequent to the date of attachment or garnishment.

Wherefore, the defendant-in-error, the Savings Bank of Danbury, prays that the judgment herein as modified by the United States Circuit Court of Appeals be modified so that it adjudge that the plaintiff-in-error, Dietrich E. Loewe, as surviving partner of the firm of D. E. Loewe & Company, is not entitled to recover the accrued interest or dividends on said attached bank accounts, and only recover of the defendant-in-error, the Savings Bank of Danbury, the sum of Four hundred twenty-eight and 52/100 dollars ($428.52), and his costs, and that said judgment as entered by the United States District Court for the District of Connecticut, be restored in the form in which it was entered before it was modified and affirmed by the said United States Circuit Court of Appeals.

Dated, Danbury, August 7th, 1916.

J. MOSS IVES,
Attorney for Defendant in Error,
The Savings Bank of Danbury.

69 (Endorsed:) United States Circuit Court of Appeals for the Second Circuit. Dietrich E. Loewe, etc., Plaintiff-in-Error, vs. Savings Bank of Danbury, Defendant-in-Error. Assign-

ment of Errors and Prayer for Reversal. J. Moss Ives, Danbury, Conn., Attorney for Defendant-in-Error. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 11, 1916. William Parkin, Clerk.

70 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 69 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Dietrich E. Loewe, etc., against Savings Bank of Danbury as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 14th day of August in the year of our Lord One Thousand Nine Hundred and sixteen and of the Independence of the said United States the One Hundred and forty-first.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 9/11/16. Wm. P.]

71 *Citation.*

The United States Circuit Court of Appeals, Second Circuit.

UNITED STATES OF AMERICA, *ss:*

To Dietrich E. Loewe, as surviving partner of the firm of D. E. Loewe & Co., of the Town of Danbury, Fairfield County, Connecticut, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the United States Circuit Court of Appeals for the Second Circuit, wherein you are plaintiff in error and The Savings Bank of Danbury, of Danbury, Connecticut, is defendant in error to show cause, if any there be, why the judgment rendered against the said defendant in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Dated, this 10th day of August, 1916.

[Seal United States Circuit Court of Appeals, Second Circuit.]

ALFRED C. COXE,
Judge of the United States Court of Appeals, Second Circuit.

Due and lawful service of the above and foregoing citation on this 11th day of August, 1916, is hereby acknowledged and accepted.

WALTER GORDON MERRITT,
Counsel for Plaintiff in Error.

72 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Dietrich E. Loewe, etc., Plaintiff-in-Error, vs. Savings Bank of Danbury, Defendant-in-Error. Citation. J. Moss Ives, Danbury, Conn., Attorney for Defendant-in-Error. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 11, 1916. William Parkin, Clerk.

Endorsed on cover: File No. 25,543. U. S. Circuit Court Appeals, 2d Circuit. Term No. 713. The Savings Bank of Danbury, of Danbury, Connecticut, plaintiff in error, vs. Dietrich E. Loewe, as surviving partner of the firm of D. E. Loewe & Co. Filed October 9th, 1916. File No. 25,543.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1916.

No.

THE SAVINGS BANK OF DANBURY,
Plaintiff-in-Error,

vs.

DIETRICH E. LOEWE, as surviving partner of the firm of D. E. Loewe & Company,
Defendant-in-Error.

MOTION TO ADVANCE.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Comes now the Defendant-in-Error by his attorneys, and moves that the above-entitled cause be advanced and set down for argument at an early date.

Statement of Matter Involved.

This is an action in *scire facias* to satisfy judgment obtained in the case of Loewe *vs.* Lawlor (Danbury Hatters' Case), by collecting savings banks accounts which

were attached in that case. That said case of Loewe *vs.* Lawlor was commenced in September, 1903; that in 1907 it reached the Supreme Court of the United States for decision on demurrer, and in February, 1908, the demurrer was overruled by that court (208 U. S. 274); that on April 18th, 1910, after trial by jury, judgment was secured for $232,240.12; that said judgment was reversed on defendants' writ of error and that on the 15th day of November, 1912, after a second jury trial, judgment was secured for $252,130.90; that said judgment was affirmed by the Circuit Court of Appeals on writ of error and on January 5th, 1915, said judgment was affirmed by the Supreme Court of the United States (235 U. S. 522).

In order to satisfy said judgment, plaintiff brought suits against various savings banks (including plaintiff-in-error herein) to recover the amount of certain attached savings bank deposits belonging to the original defendants; that it appeared that said attached accounts had been purchased by the United Hatters of North America, the union to which said defendants belong, and that said United Hatters of North America was the owner of said accounts subject to the rights of the defendant-in-error herein as attaching creditor; that the said United Hatters then claimed that the interest or dividends which had accrued on such savings bank accounts subsequent to the attachment, amounting in all to about $20,000.00, belonged to it and were not held by the attachment, and said United Hatters demanded payment of said moneys; that the said banks thereupon severally caused notice to be given to the United Hatters of the suits brought against them by the defendant-in-error herein, and said United Hatters subsequently appeared and answered, claiming said interest; that the District Court ruled that the United Hatters was entitled to said interest or dividends (226 Fed. 294) and only gave the plaintiff judgment for $428.52, the amount of unpaid principal. Plaintiff sued out a writ of error to the Circuit Court of Appeals for the Second Circuit, which held that he was entitled to

such dividends by virtue of his rights as attaching creditor and the judgment was accordingly modified and affirmed (Fed.). The parties to these respective suits stipulated that the entry of final judgment in all said suits, except the one now before this court, should await and be determined by the final disposition of this present suit on writ of error; that the final decision in this suit will therefore determine who is entitled to the accumulated dividends in these various banks, aggregating about Twenty thousand dollars ($20,000.).

Reasons for Application.

The plaintiff herein has also started foreclosure proceedings against one hundred and forty (140) pieces of real estate for the purpose of satisfying said judgment, but he desires to first know whether the $20,000.00 interest on the savings bank accounts is applicable to the satisfaction of said judgment, and to satisfy said judgment as far as possible from this source before resorting to a sale of the real property. That he has only collected about $35,000 00 on account of his said judgment, and since it was fourteen years ago that his business was attacked and nearly thirteen years ago that he originally entered court, and since this proceeding is brought for the sole purpose of securing indemnity for the damage so caused about fourteen years ago, and of securing the relief sought in court nearly thirteen years ago, the plaintiff believes that he should have a preference in the hearing of this case.

Respectfully submitted,

DANIEL DAVENPORT,
WALTER GORDON MERRITT,
Attorneys for Defendant-in-Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No.

THE SAVINGS BANK OF DANBURY,
Plaintiff-in-Error,

vs.

DIETRICH E. LOEWE, as surviving partner of the firm of D. E. Loewe & Company,
Defendant-in-Error.

TO THE PLAINTIFF-IN-ERROR AND ITS ATTORNEYS, J. MOSS IVES, AND TO THE UNITED HATTERS OF NORTH AMERICA AND ITS ATTORNEYS, WILLIAM F. TAMMANY AND MARTIN J. CUNNINGHAM:

You, and each of you, will please take notice that the Defendant-in-Error will on Monday, the 9th day of October, 1916, at the opening of Court on the morning of that day, or as soon thereafter as counsel may be heard, move the above-entitled Court to advance the hearing of the above-entitled case.

DANIEL DAVENPORT,
WALTER GORDON MERRITT,
Solicitors and Attorneys for Defendant-in-Error.

The undersigned join in the request that the cause be advanced.

J. Moss Ives, Atty for Savings Bank of Danb

Wm F. Tammany

Solicitor and Attorney for The United Hat

BRIEF FOR UNITED HATTERS OF NORTH AMERICA, CITED IN TO DEFEND.

(RECORD, PAGE 9)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 713

THE SAVINGS BANK OF DANBURY, OF DANBURY, CONNECTICUT, PLAINTIFF IN ERROR

v.

DIETRICH E. LOEWE, AS SURVIVING PARTNER OF THE FIRM OF D. E. LOEWE & CO.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND DISTRICT

(25,543)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 713

THE SAVINGS BANK OF DANBURY, OF DANBURY, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

DIETRICH E. LOEWE, AS SURVIVING PARTNER OF THE FIRM OF D. E. LOEWE & CO.

In error to the United States Circuit Court of Appeals for the Second Circuit.

Brief for United Hatters of North America, Cited in to Defend.
(Record, page 9.)

But one question is presented by the record. Certain dividends have been declared by the plaintiff in error since the attachment was made under the Connecticut garnishee process. Do said dividends belong to the defendant in error, or are they the property of and payable to the United Hatters of North America under the assignments from the original depositors?

The trial court held that the defendant in error is not entitled to said dividends.

Judgment, page 11 of record.
Opinion, page 14 of record.

The circuit court of appeals held that the defendant in error is entitled to said dividends.

Opinion, page 27 of record.

the hands of the garnishee **at the time of the attachment,** or **debts then due** from him to the defendant" shall be liable for the payment of any judgment in a case such as the one at bar, and distinguishes between such effects or debts and any debt, legacy or distributive share due or to become due from an estate. And still more significant is that portion of said section which provides that if the garnishee "shall not pay to the officer, when demanded, the **debt due to the defendant at the time the copy of the writ was left with him,** such garnishee shall be liable" etc. No mention is made in Section 880 or Section 931 of dividends or profits. If the legislature had intended that dividends and profits should be held by the garnishee process, it would beyond any doubt have so provided. When the legislature found it expedient and advisable in another connection to provide for the attachment of dividends and profits it found no difficulty in expressing its purpose. Attention is directed to Section 833 and 915 of the Connecticut Statutes.

> Section 833 provides: "Rights or shares in the stock of any corporation, together with the **dividends and profits** due and growing due thereon, may be attached" etc.
>
> Section 915 provides: "The levy of an execution on the rights or shares which any person owns in the stock of any corporation, together with the **interest, dividends and profits,** due and growing due thereon, shall be by leaving a true and attested copy" etc.

In the one case the Legislature provided for the attachment of dividends and profits. In the other case, it did not so provide. In each case we think the Legislature clearly expressed its purpose. The principle of law is well settled that when the Legislature has expressed itself in clear and unmistakable language, nothing is to be taken by intendment. This principle applies with great force to the Statutes to which attention has above been directed. Moreover, the provision for the attachment of profits and dividends in the one case impliedly prohibits their attachment in the other.

> In City of New Haven v. Whitney, 36 Conn., 373, 375, the Court say:
>
> "A statute that prescribes that a thing should be done in a particular way, carries with it an implied prohhibition against doing it in any other way."
>
> Broom's Legal Maxims, 7th Ed., 664.

Our contention is that **only the estate existing at the moment of service is held by the attachment. At the time of service of the process the dividends in question had not been declared, were not in existence, and were not held by the attachment,** and we submit that the defendant in error (original plaintiff), in instituting this action, realized that he could recover only the money and estate of the judgment defendants in the hands of the plaintiff in error at the time of service of the writ in the original action; and said money and estate then in the hands of said Bank is all that is described or claimed in the writ and complaint in this action. Record, 2 to 5 inclusive.

As said in Fitch vs. Waite, 5 Conn. 117, 122:

> "The moment of service, is the precise period, when a debt is attached; and if it be then existing, it is secured by the process; but if it does not then exist, no lien is created; as the operation of an attachment, by its nature is immediate, and not prospective. A future liability is not attachable, for the conclusive reason, that it is not a debt due."

The foregoing case is quoted by the Court in Grosvenor vs. The Farmers & Mechanics Bank, 13 Conn., 104, 107, where the Court say:

> "These principles have received the sanction of Courts of great respectability."
>
> Cites numerous cases.

The Statutes of Connecticut which regulate the declaration of dividends by Savings Banks are as follows:—

> Section: 3440. "The net income of any savings bank, in excess of one-eighth of one per cent. of its deposits, actually earned during the six months last preceding, and no more, may be semi-annually divided among its depositors. No dividend shall exceed a rate of four per cent. per annum, except as provided in Section 3441."
>
> Section 3441. "No savings bank shall make any dividend, except as provideed in Section 3440, unless its surplus shall have accumulated to an amount equal to three per cent. of its deposits. Such surplus shall be kept as a contingent fund; but no savings bank shall carry to its contingent fund, more than ten per cent. of its deposits; and any surplus beyond that amount, shall be divided among the depositors entitled to such dividends, in sums of not less than one per cent of its deposits."

Section 3441 was amended by Chapter 187, Connecticut Public Acts of 1913, by increasing the amount which might be carried to the contingent fund from ten to not more than fifteen per cent of deposits, and by setting forth what the contingent fund should include.

Section 3442 authorizes discrimination between deposits of one thousand dollars or less, and those over that sum.

The dividends in question have been declared semi-annually by the plaintiff in error agreeable to the foregoing sections of said statutes and the Bank's charter.

The course of the Bank's conduct was and is, therefore, specifically defined and limited by the law. There was no contract for the payment of interest, and such contract, if made, would be **ultra vires** and void. The Bank performed the duty imposed on it by law, and there is no legal liability for interest. The Bank has at all times had the money to pay, and has been ready to pay on demand as soon as payment could safely be made. The Bank is not, in any sense, a litigant.

Cyc., Vol. 20, page 1067.

The Circuit Court in its opinion (Record-Page 34) says:

> "And the record in this case does not disclose the organization, powers and mode of doing business of the Danbury Savings Bank. We do not know whether it had capital stock or not."

We think this statement is sufficiently met by reference to the General Statutes of Connecticut, of which the Court must take judicial notice, and by the opinion of the trial judge (Record, page 17) where the Court says:

> "And this brings us to the vital question involved:—were these banks (in the absence of an express contract to pay interest) under legal obligation to pay these depositors interest on their deposits as an incident of the deposit, and was there any legal remedy open to the depositors at the time of the attachments to enforce such obligations? In my opinion each of these questions must be answered in the negative. Savings banks, as they exist in Connecticut are held to be incorporated agencies of the depositors for their benefit, and a person making a deposit in a savings bank becomes substantially a part owner of all the assets of the bank. This was held in Osborn vs. Byrne, 43 Conn., 155, 160, where it was said that a savings bank is an incorporated agency for re-

ceiving and loaning money on account of the owners; it has no stock and no capital, and is merely a place of deposit where money can be left to remain or to be taken out at the pleasure of the owner, and that the depositors in savings banks bear the same relation to each other and to the assets of the bank that stock-holders in other monetary institutions do to each other and to the property of the bank."

WHETHER ANY SAVINGS BANK WILL EARN AND DECLARE DIVIDENDS IS INDEFINITE AND UNCERTAIN.

Whether or not earnings or profits will be made by any savings bank is indefinite and uncertain. Savings banks have failed before this, and others will fail. Any one of many things may cause this result.

The garnishee process will hold only existing debts or obligations. There must be no uncertainty, and the fact that it is morally certain that a debt will mature and become due, makes no difference. The dividends declared by the several savings banks, are of this character. In the case of Easterly vs. Keney, 36 Conn., 18, 22, the Court say:

"The relation of the petitioner to the rents and profits therefor, does not differ in any respect from that of any other creditor of the **cestui que trust,** or from that of any creditor to the funds of his debtor in the hands of a third person. If the trustee has the funds in his hands belonging to the **cestui que trust,** they are liable to foreign attachment, and this is adequate remedy at law, so far as they are concerned. In relation to the rents and profits that **may here after** come into the hands of the trustee, we know of no law or practice that will enable the petitioner, by the aid of a petition, to seize them **before they accrue** or come into the hands of the trustee. The mere fact that it is **morally certain** that the trustee will, at times, have the funds of the cestui que trust in his hands, can make no difference. If this petition can be sustained, so could one in any case where the probability is strong that the funds of a debtor will come into the hands of a third person, which would be a novel proceeding in courts of equity. We think it cannot be done. The petitioner has acquired no interest in these funds by attachment or execution. He stands merely in the relation of a creditor to a debtor, who may have funds in the hands of a third person."

The case of Smith vs. Gilbert, 71 Conn., 149, further shows that the garnishee process does not deal with uncertainties. Here an attempt was made to attach real estate, and to factorize a legacy due, or to become due, to the defendant. The Court, page 156, say:

> "The process of foreign attachment is unadapted to secure an interest in remainder so remote and uncertain. It contemplates an uninterrupted and continuous possession by the garnishee, from the date of the attachment, to that of the demand on execution. The executor has no power to hold enough of the personal property and money of the estate, to pay this possible legacy, until the happening of the event upon which the legacy depends, and until demand is duly made upon him as garnishee upon execution in the action by foreign attachment. Before that time, the Court of Probate may order the money and personal property to be delivered to the widow upon her giving a proper bond, and upon her failure to give such bond, the Court of Probate will appoint a trustee to take charge of such estate during the continuance of the life estate."

In the case at bar, the dividends might never have been declared. The earnings might not have justified the declaration of a dividend; there might have been a run on the bank, resulting not only in no declaration of dividend, but in other losses to the depositors; there might have been dishonest employees, as there have been in other banks; the money might have been paid into court by the bank; or any one of a great many things could have prevented the declaration of dividends, so that whether anything would ever be earned or become due or payable, following said attachment, is uncertain and problematical. Surely that was not the existing debt which the law contemplates.

In Geer vs. Chapel, 77 Mass., 18, the Court holds that Juror's fees which have not been allowed by the Court, are not subject to trustee process in foreign attachment, though the services had in fact been rendered.

In Hancock vs. Colyer et ux, 99 Mass., page 187, the Court say:

> "The check of a third party to the order of the supposed trustee, is not attachable by trustee process. It is not money, goods, effects or credits, in the sense of the statute. It may never **be paid.** The liability of the trustee to the principal defendant is therefore contingent." And on page 188 (same case), the court say:

"The other ground of distinction cannot prevail against the well settled rule that the validity of the attachment must be determined by the **state of facts existing at the time** of the service of the writ."

Meacham vs. McCorbitt, 2 Met. 352.
Knight vs. Bowley, 117 Mass., 551.
Land vs. Felt, 73 Mass., 491.

In Hadley vs. Peabody, 79 Mass., 200, the salary of a school teacher was payable quarterly, and the service of trustee process was made in the middle of a quarter. It was held that the process was of no effect, the Court saying:

"It was not a debt, and might not become a debt; the contract was entire, and until completed on the part of the teacher, nothing was due. We think this point is settled by authorities."

Brackett vs. Blake, 7 Met. 335.
Robinson vs. Blake, 7 Met. 335.
Daily vs. Jordan, 2 Cush. 390.
Osborn vs. Jordan, 3 Gray, 277.

In Wyman vs. Hichborn, 60 Mass., 264, where the salary of a clergyman was payable quarterly, and he resigned before the quarter expired, and an attempt was made to attach for the period of actual service, the Court say:

"The claim against the trustee may be a debt **payable in future,** but to charge the trustee, it must be a **certain debt** which will become payable **upon the lapse of time,** and **not a contingent liability,** which may become a debt or not, on the performance of other acts, or the happening of some uncertain event."

Taber vs. Nye, 29 Mass., 105.
Tucker vs. Clisby, 29 Mass. 22.
Guild vs. Holbrook, 28 Mass. 101.
Frothingham vs. Haley, 3 Mass. 67, 70.
Willard vs. Sheafe, 4 Mass. 234, 235.

THE WORDS "INTEREST AND DIVIDEND" ARE NOT INTERCHANGEABLE.

The Circuit Court treated the words "interest" and "dividend" as practically interchangeable. In this we claim the Court to have erred.

In Carey vs. Savings Union, 22 Wall (U. S.), 38, it is held that "where depositors in a savings bank do not receive a fixed rate of interest independently of what the bank itself makes or loses in lending their money, but receive a share of such profits as the bank by lending their money makes, after deducting expenses, etc., such **share of profits** is a **dividend,** and **not interest."**

In Gibbons vs. Mahon, 136 U. S. 558, the Court say:

"Money earned by a corporation remains the property of the corporation, and does not become the property of the stockholders, **unless** and **until** it is distributed among them by the corporation. The corporation may treat it and deal with it either as profits of the business, or as an addition to its capital. Acting in good faith and for the best interests of all concerned, the corporation may distribute its earnings at once to the stockholders as income; or it may reserve part of the earnings of a prosperous year to make up for a possible lack of profits in future years; or it may retain portions of its earnings and allow them to accumulate, and then invest them in its own works and plant, so as to secure and increase the permanent value of its property."

And in the same case, the Court say:

"A dividend is something with which the corporation parts."

In New York, Lake Erie & Western Railroad Co., vs. Nickols, 119 U. S., 296, as to when dividends are payable, the Court say:

"A declaration of profits, as, in itself, and without further action by the directors, entitling shareholders to dividends, is unknown in the law or in the practice of corporations. Dividends are **"declared"** by some formal act of the corporation, the question whether there are or are not profits, being settled entirely by the accounts of the Company as kept by subordinate officers, not by the mere statement of directors as to what appears upon its books. * * * * We are of the opinion that while the agreement of 1877 and the articles of association sustain the claim of preferred stockholders to a six per cent dividend in advance of common stock-holders, the former are **not entitled, of right, to dividends,** payable out of the net profits accruing in any particular year, **unless** the **directors** of the Company **formally declare,** or **ought to declare, a** dividend payable out of such profits; and whether a **dividend should be declared** in any year, is a matter **belonging in the first instance** to the directors to determine, with reference to the condition of the com-

pany's property and affairs as a whole."

In Mobile & Ohio Railroad Co., vs. Tennessee, 153 U. S. 486, the Court defining the term "dividend" says:

> "The term **'dividend'** in its technical as well as in its ordinary acceptation, means that portion of the profits which the corporation, **by its directory,** sets apart for ratable division among its shareholders."

In Bryan vs. Sturges National Bank, 40 Texas Civil Appeals, 307, 311, affirmed 101 Texas 630, the Court say:

> "The accumulated earnings or surplus funds of a bank constitute a part of its assets, and belong to the corporation and not to the stockholders, until they have been **declared and set apart as dividends."**

And in said case, the Court also say:

> "The **dividends thereafter declared,** and which it is now sought to reach and subject to the payment of James W. Boyd's debt, had **no existence** and were not property within the meaning of the statute at the time he was declared a bankrupt, and discharged from liability as to former indebtedness."

> And the Court further say: "but * * * * * title to the **dividends cannot exist until after such dividends** have been brought into **existence, by a declaration to that effect,** by the governing body of the corporation."

Cyc, Vol. 10, page 546.

In Southern Amusement Co., vs. Neal (Georgia Court of Appeals, 1914) 82 S. R. 765, 766, the Court says:

> "Of course, it is well settled that a creditor cannot reach by garnishment, assets which the debtor himself could not recover from the garnishee; for what one cannot recover himself, cannot, by garnishment, be recovered against him."

Drake in his work on "Attachments" Section 551, says:

> "The debt from the garnishee to the defendant, in respect of which it is sought to charge the former, must moreover be absolutely payable, at present or in future, and not dependent **on any contingency.** If the contract between the parties be of such a nature that it is uncertain and contingent whether anything will ever be due in virtue of it, it will not give rise to such a credit as may be attached; for that cannot properly be called a debt which is not certainly and at all events payable, either at the present or some future period."

Taber vs. Nye, 12 Pick, 105.
Wood vs. Patridge, 11 Mass. 488.
Hadley vs. Peabody, 13 Gray, 200.
Brackett vs. Blake, 7 Met. 335.

In Section 553, the same authority says:

"As the attaching plaintiff can acquire no other or greater rights against the garnishee than the defendant has, it follows that though the garnishee be indebted to the defendant, yet if there be anything to be done by the latter as a condition precedent to his recovering his debt in an action against the garnishee, the plaintiff cannot obtain judgment against the garnishee, without performing the condition."

The same authority in Section 667 says:

"The garnishee's liability, considered with reference to the time of garnishment, cannot, without the aid of special statutory provision, be extended beyond the defendant's effects or credits in his hands **at the date of the garnishment.** The attachment is the creative of the law, and can produce no effect which the law does not authorize. Its operation, when served, is upon the attachable interests **then in the garnishee's possession;** and it cannot be brought to bear upon any liability of the garnishee to the defendant **accruing after its service, unless the law so declare.** And if such liability at the time of the garnishment be dependent on the happening of a contingency, which does happen afterwards, so as to create an absolute debt, yet the garnishee cannot be so charged; for such was not the condition of things at the time of the garnishment."

Williams vs. A. & K. Railroad Co., 36 Maine, 201.

Bouvier's Law Dictionary, (Rawle's Third Revision), defines "interest" as follows:—

"The compensation which is paid by the borrower of money to the lender for its use, and, generally, by a debtor to his creditor in recompense for his detention of the debt.

The compensation allowed by law or fixed by the parties to a contract for the use or forbearance or detention of money.

A consideration paid for the use of money or for forbearance in demanding it when due."

These definitions of "interest" and the foregoing authorities on "dividends" show the very marked difference in the meaning of the words.

That this difference is recognized in Connecticut is shown by the case of Lippitt vs. Thames Loan & Trust Co., 88 Conn., 185, in which (page 207) the Court say:

> "Savings bank depositors, as a rule, are not entitled to dividends on their deposits, until declared. As we understand the facts of this case, the several savings department depositors have not made their deposits upon a special contract to pay them a stated rate of interest If our understanding be correct, the savings department depositors are not entitled to **interest,** or to **dividends** upon their deposits **beyond the last declaration of dividend."**

This case would seem to be conclusive of the case at bar. The judgment defendants, whose accounts were attached, were entitled, on that date, to recover from the banks only the amount then due, including the dividends last declared. For the intervening time, if the money had been withdrawn, they were entitled to absolutely nothing. The attaching creditor held exactly what was then due to the judgment defendants and no more.

Cyc, Vol. 5, Page 555.
Cyc, Vol. 20, Page 1054.

In the case of Ransom vs. Bidwell, 89 Conn., 137-140, Section 880, of the General Statutes, is construed, and the use of the word "due" as used therein, is defined as follows:

> "The meaning of the word 'due' as used in this statute, is one of the controlling questions in the present case. This word is defined in the Bouvier Law Dictionary (Rawle's 3d. Revision, p. 946), as "what ought to be paid; what may be demanded." It is also stated by Bouvier that the word 'due' differs from 'owing,' in that a thing that is owing may not be due."

And in the same case, page 141, the Court say:

> "It is apparent that the words 'debt due' as used in Section 880 of the General Statutes, imply an **existing obligation to pay** either in the present or future. This doctrine has been expressed in many of the decisions by this Court, nor has this rule been confined to cases where the amount of the claim garnisheed was liquidated."

In the case at bar, there was no existing obligation to pay interest or dividends either in the present or in the future. There was no contract to pay. There was no duty imposed by law to pay. The conditions did not exist which bring the case within the Connecticut Garnishee Statute. The

dividends were not earned, or due, or owing, at the time of the attachment, but were uncertain and contingent.

That the dividends were not held by the attachment we think can be shown in another way.

Section 849, General Statutes of Connecticut, 1902, provides for the dissolution of attachment of "any debt or effects taken by process of foreign attachment" on application and "upon the substitution of a bond with surety." Section 850 prescribes the form of application; section 851 provides for notice to the plaintiff, or his attorney, and prescribes the form of notice; section 852 provides for the amount of the bond, and hearing as to its sufficiency; and section 853 prescribes the form of the bond and for the payment by the surety to the plaintiff of "the actual value of the interest of" the defendant "in said attached property at the time of said attachment, not exceeding the amount of" the recognizance.

Assume that immediately after the money in the defendant Bank had been attached the original defendants had made application to the court for the dissolution of the attachment on substitution of bond, with surety; that the necessary statutory steps were taken, a bond ordered and given, the money released from the attachment and withdrawn from the Bank, and immediately redeposited in the bank in the name of the bondsman, and dividends declared and credited thereon; that ultimately the plaintiff recovered judgment, and perforce must look to the bond for payment. What amount can he recover? He will be limited absolutely to the actual value of the estate at the time of the attachment—to the amount of money credited to the original defendants at the time of service of the process on the Bank. The dividends would belong to the bondsman.

Perry vs. Post et al., 45 Conn., 354.
McNamara vs. Mattei, 74 Conn., 170.
Mallory vs. Hartman, 86 Conn., 615.

In the case at Bar no bond was substituted for the property attached, but the United Hatters of North America paid to the original defendants the amounts of their deposits and received from them transfers thereof, and thereupon became the equitable and **bona fide** owner of said estate subject to the attachment. No attempt was made to withdraw the money from the Bank, but the attached estate was left intact to respond to any judgment to the amount of the actual value of said estate at the time of attachment, just as though a bond in fact had been given. Had the bond been

given, the attachment dissolved, and the money then transferred to the United Hatters, the dividends would unquestionably have belonged to them; and we contend that the dividends are theirs just as fully as though a bond had been given. The only real difference is that the cash was left in the bank and was available to apply on the judgment, instead of being recoverable under a bond.

THE DEFENDANT IN ERROR ACQUIRED A LIEN ONLY ON THE ATTACHED PROPERTY.

The attached property was made subject to a lien in favor of the attaching creditor, but we claim that the lien attached only to property in existence, or debts due at the time of the attachment.

Real Estate in Connecticut is attached in a manner very similar to that of the Garnishee Process. Section 829 of the General Statutes provides as follows:—

> "Real Estate shall be attached by the officer by lodging in the office of the town clerk of the town in which it is situated a certificate that he has made such attachment, which shall be indorsed by the town clerk with a note of the precise time of its reception, and kept on file, open to public inspection, in the office of said town clerk; and said attachment, if completed as hereinafter provided, shall be considered as made when such certificate is so lodged. The certificate shall be signed by such officer, shall describe the land attached with reasonable certainty, and shall specify the parties to the suit, the court to which the process is returnable, and the amount of damages claimed; and the officer shall, within four days thereafter, leave in the office of such town clerk a certified copy of the process under which the attachment was made, with an endorsement of his doings thereon; and unless the service shall be so complete, such estate shall not be holden against any other creditor or bona fide purchaser."

Section 921 provides for levy of execution on real estate, and section 4149 for the filing of a judgment lien.

By the filing of an attachment the power of alienation is not destroyed, but any conveyance must be made subject to the attachment lien. Attached real estate can be conveyed. In the same way a Bank Account can be conveyed. Even the defendant in error will not contend that the attachment

of the real estate holds the rents as they from time to time accrue. The dividends declared by the Banks are the equivalent of the rents from the real estate. Why should one be held and not the other? The rents are surely as much of an incident of the real estate as the dividends are of the bank deposits. Since the rents from real estate are not held by attachment of the realty, it is inequitable and unjust to hold that the after declared dividends on bank deposits are held by the garnishee process.

Take the case of two men, one having $5000.00 invested in real estate and the other $5000.00 deposited in a savings bank. They incur liabilities and are sued. The real estate is attached in one case, the bank account in the other. If the decision of the Circuit Court be correct, the man owning the real estate goes on and collects the rents therefrom without any interruption, but he who placed his money in the bank is immediately cut off from the dividends and deprived of his income. And this, though the conditions are precisely alike, it being uncertain and contigent whether rents will be earned in the one case or dividends in the other. To give the garnishee process this effect is to do violence to the Connecticut Law, and gross injustice to parties affected by it.

The cases referred to by the Circuit Court, supporting the claim that dividends are held by attachment of stock, have been decided under the law of the particular state in which the question arose, and they do not control in the case at bar.

That the defendant in error had but little faith in the case of Jacobus vs. Monongahela National Bank, (Opinion of Circuit Court, record, page 32) is shown by the fact that though he quoted the case in his brief filed in the Circuit Court he, in the same brief, admitted that dividends on stock would not be held by attachment in Connecticut except by virtue of Sec. 833 of Connecticut Statutes, (supra) when he said:

> "that Section 833 provides that dividends and profits on stock are attachable is further evidence of this general purpose to reach all of the debtor's property, and profits were specifically mentioned in connection with the attachment of stock because **they would not be reachable by attachment without such specification.**"

If Jacobus vs. Bank is good law and an authority, why would profits and dividends on stock not be reachable by at-

tachment without such sepcification?

When the defendant in error **admits** that the **dividends** and **profits** on **stock** are **not attachable** except by virtue of the provisions of Section 833, what becomes of the case of Jacobus vs. Bank? If the dividends follow the stock, as claimed on the authority of that case, the specification in the Connecticut Statute would be unecessary; but the defendant in error admits that the dividends and profits "would not be reachable by attachment without such specification" and in this he is correct. And specification for the attachment of dividends on savings bank deposits is just as necessary, but unfortunately for the defendant in error such specification has not been included in the law. Therefore the dividends on bank deposits are not "reachable by attachment." And not being reachable by attachment, it follows that the dividends in question are not held by the attachment, and do not belong to the defendant in error, but do belong to the United Hatters of North America.

THE CONNECTICUT LAW PROVIDES FOR REASONABLE IMMUNITY OF THE DEBTOR.

The Circuit Court in its opinion, (Record, page 31,) quotes from Ransom v. Bidwell, 89 Conn., 137, that:

> "All the property of a debtor not exempt from execution shall be made subject to the payment of his debts, and that every facility consistent with the reasonable immunity of the debtor should be afforded to subject such property to legal process."

This is unquestionably the Connecticut law, but in the same case the Court (page 141,) holds:

> "It is apparent that the words 'debt due,' as used in Par. 880 of the General Statutes, imply an **Existing obligation** to pay either in the present or future."

So that the estate of the debtor to be subjected to the payment of his debts must be an "existing obligation" and not something dependent on a "condition precedent to the liability" (Opinion of Circuit Court, Record, page 31) as it is dependent when profits must be earned and dividends declared before the debtor's rights to the estate mature.

And that the Court will carefully protect and preserve the immunity of the debtor is shown by the very recent case

Supreme Court of the United States

October Term, 1908.

No. 66

THE NATIONAL BANK OF DANBURY, vs. DANBURY, CONNECTICUT,

Plaintiff in Error,

vs.

DEMPSEY B. LOEWE, as surviving partner of the firm of D. B. Loewe & Co.,

Defendant in Error.

ERROR TO THE SUPREME COURT OF CONNECTICUT.

DANIEL DAVENPORT,
WALTER GORDON MERRITT,
Attorneys for Defendant in Error.

Gibson Quinn, Jr., Law Printer, 81 Church St., Hartford.

INDEX.

Legal Points.

Cases Cited.

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 713.

THE SAVINGS BANK OF DANBURY, OF DANBURY, CONNECTICUT,
Plaintiff-in-Error,

vs.

DIETRICH E. LOEWE, as surviving partner of the firm of D. E. Loewe & Co.,
Defendant-in-Error.

BRIEF OF DEFENDANT-IN-ERROR.

Failure of the plaintiff-in-error to include in its brief "a concise abstract or statement of the case," in accordance with the rules of this Court, leaves us to supply the omission.

The United States Circuit Court of Appeals for the Second Circuit, on a writ of error sued out by Dietrich E. Loewe, modified and affirmed a judgment herein of the United States District Court for the District of Connecticut, and the Savings Bank of Danbury, the present plaintiff-in-error, on writ of error to this Court, asks for a reversal of that part of the ruling of the Circuit Court of Appeals

which modified the judgment of the District Court; it seeks a restoration of the judgment of the District Court. We refer to the parties hereafter as plaintiff and defendant, as they appeared in the lower court.

The action is one in *scire facias* brought pursuant to Section 931 of the General Statutes of Connecticut, revision of 1902, to recover attached savings bank accounts which were levied upon in the Danbury Hatters' Case (*Loewe* v. *Lawlor*) by writ of attachment issued out of the United States Circuit Court in August, 1903, pursuant to Section 880 of the General Statutes of Connecticut, revision of 1902. The only question is whether the plaintiff, as attaching creditor, is entitled to the accumulated dividends which accrued *pendente lite* on said attached deposits and were added thereto, or whether the plaintiff is entitled to interest thereon in any form. Similar actions are pending against other savings banks involving the same issue, but by stipulation, which does not appear in this record, judgment in said actions is to be controlled by the ultimate disposition of this case. The accumulated dividends on these various deposits in these respective actions which are involved in the opposing contentions of the parties amount in all to nearly twenty thousand dollars.

One of the plaintiffs having died, this action is continued by Dietrich E. Loewe, as surviving partner of the firm of D. E. Loewe & Co. (p. 11).

On September 27th, 1913, defendant appeared in this action (p. 6), and on February 16th, 1915, judgment by default was entered for want of pleading (p. 6).

On May 13, 1915, a motion was made by defendant (pp. 6-9) setting forth that in December, 1903, after the attachments, the attached bank accounts had been assigned to United Hatters of North

America, which on February 5, 1915, demanded payment of the accumulated dividends thereon (p. 5), and praying that said United Hatters be given notice of the pendency of this action and furnish indemnity against costs, pursuant to Section 937 of the General Statutes of Connecticut (pp. 5-6), and further praying that a hearing in damages upon default be granted (p. 6). An order was duly entered granting said motion (pp. 9-10), and said United Hatters thereupon filed its bond (p. 10) and served a so-called answer (pp. 10-11).

The essential facts are agreed upon (pp. 20-21) and were also found by the Court and embodied in the judgment file (pp. 11-13). All of the allegations of the complaint are admitted (p. 20), except the amount alleged to be due in paragraph 7, which amount is fixed at $18,461.54, and it appears therefrom that the plaintiffs brought a civil action in the Circuit Court by lawful writ of attachment issued and dated August 31st, 1903, demanding $240,000 damages and directing the Marshal to attach the property of over one hundred and fifty named defendants (pp. 3-4); that said writ was duly served on said defendants and upon "the Savings Bank of Danbury, defendant herein *as agent, trustee and debtor* of and to each" of the defendants (p. 4); that the plaintiffs recovered judgment against the said defendants on November 15th, 1912, for $252,130.90 (pp. 4-5), for which they took out execution (p. 5); that the Marshal to whom said execution was given for service "made demand of the Savings Bank of Danbury, the present defendant *as agent, trustee and debtor* of and to each of said judgment-debtors severally of the sums contained in said execution and his costs and fees and *of any estate* of each or any of said several judgment-debtors in its hands or money due from it

to each or any of said judgment-debtors" (p. 5). "The Savings Bank of Danbury, the defendant herein * * * refused to pay said execution or to show any estate of any of the aforesaid individual judgment-debtors or to pay any debt due from it to any of the aforesaid judgment-debtors individually to said officer whereon to levy said execution" (p. 5); that said execution was returned wholly unsatisfied (p. 5); that at the time said writ of attachment was left with the Savings Bank of Danbury in service, it "was indebted to each of said defendants severally in various sums of money and had in its hands the estate of each of said defendants and yet it would not expose or discover any said estate of any of said defendants whereon said execution might be levied, nor pay said debts or any part thereof to said officer" (p. 5). It is admitted that the amount so held by the defendant herein at the time of the attachment in 1903 was $18,461.54 (p. 20).

It is found by the Court that the moneys

> "so attached were savings bank deposits which the defendant held for the depositors under the terms of its charter which provided as follows:
>
> 'All deposits of money received by said corporation *shall be used and improved* to the best advantage * * * and the income or profits thereof *shall be applied as dividends among the persons making the deposits,* their executors and administrators, in just proportion, with such reasonable reduction as may be chargeable thereon'" (p. 12).

After the attachment, the United Hatters purchased *"the said attached estate,"* paying full value therefor, and thereupon "became the equi-

table and *bona fide* owner of said estate, subject to the rights of the plaintiff acquired by virtue of said attachment" (p. 13). That since said attachment, the defendant has, in accordance with the terms of its charter, "used and improved the moneys so deposited with it and has regularly declared dividends upon said several deposits payable from the income and profits earned by the defendant from these and its other deposits, and that the aggregate amount of dividends so declared upon the several deposits levied upon by said writ of attachment is $11,278.13" (p. 13); that subsequent to the commencement of this action, and on June 26 and July 8, 1915, respectively, the defendant made payment to the plaintiff of all the principal of said attached savings bank accounts, except the sum of $428.52 (p. 13).

The District Judge decided that the attachments did not hold the dividends or interest accruing on the savings bank deposits *pendente lite,* and that, therefore, the United Hatters of North America, the assignee of said deposits, was the rightful owner of said accrued interest and dividends, and the plaintiff could only have judgment for the unpaid balance of the principal, amounting to $428.52 (pp. 14-19); judgment was, therefore, entered in favor of the plaintiff for this small sum (p. 13). On writ of error, the Circuit Court of Appeals held that the plaintiff's rights as attaching creditor included the accumulated dividends on the deposits and ordered that the judgment in favor of the plaintiff be modified to include the amount of said dividends in addition to the unpaid principal of $428.52.

In reviewing the facts of the case, attention is also called to the statement in the opinion of the Circuit Court of Appeals to the effect that "the

record in this case does not disclose the organization, powers and mode of doing business of the Danbury Savings Bank." We think this is sufficiently disclosed by the findings of fact contained in the judgment, but the full charter of the Savings Bank of Danbury is found in Volume IV, pages 1079, 1080 of the Private Laws of Connecticut, passed in 1849, and Section 697 of the General Statutes of the State of Connecticut for 1902 provides as follows:

> "The public statutes of the several states and territories of the United States, as printed by authority of the state or territory enacting the same, and the private or special acts of this state, shall be legal evidence, and the courts shall take judicial notice of them."

This requirement of the Connecticut statutes that the courts shall take judicial notice of the act incorporating the Savings Bank of Danbury is controlling in the Federal courts (*Case* v. *Kelley,* 133 U. S., 21, 27). If, therefore, the Court feels that the disposition of this case requires acquaintance with the full charter of the Savings Bank of Danbury, it must take judicial notice of said charter, as contained in said volume, which shows that said bank is an ordinary savings bank, without stockholders.

POINT I.

The dividends accruing *pendente lite* belong to the plaintiff as attaching creditor.

The defendant contends that the savings bank dividends which accrued on the attached deposits *pendente lite* were not held by the attachment,

and that the depositor or his assignee was at any time entitled to draw out those dividends for his own use. This contention is based upon the claim that the dividends were *not due* at the time of the attachment, and that their future declaration was *contingent*. Defendant admits that if there had been a fixed agreement to pay interest to the depositor, the attachment would cover the interest, although it was not *then due*, but claims the rule does not apply where the payment of interest or dividends is subject to *any contingency*, however remote. It admits that if the garnishee had used the funds for its own benefit, even though the profits were contingent it would have to pay interest to the attaching creditor, but claims that since the garnishee used the funds for the benefit of the debtor, whom the attaching creditor was pursuing, the dividends or profits are not covered by the attachment.

The plaintiff contends that, according to fundamental principles of law and these very admissions which controlling authorities compel the defendant to make, it is obvious that the dividends are but an incident of the attached deposits and must follow the principal; that the interest or savings bank dividends payable under express contract from the profits earned on the deposits which, under the terms of its charter, the bank was bound to loan and improve for the benefit of the depositors, as their agent, are liened by the attachment as an incident and the usufruct of the principal sums. The defendant lays stress upon the proposition that rents of real estate under attachment do not go to the attaching creditor. But there is no comparison between attachments on personal property and real estate, as realty cannot be made the subject of a levy by taking possession, and

attachments on realty convey no interest to the attaching creditor (*Drake on Attachments,* Secs. 239-240).

The distinction between the attachment of real estate and the garnishment of the effects of a defendant in the hands of his agent, trustee or debtor in Connecticut is well known. In the case of the attachment of real estate, the creditor acquires no right, title or interest in the land by force of the attachment. So that a release by quit-claim deed of all his right, title and interest in such land will not release the attachment. This was decided in 1811 in *Lacey* v. *Tomlinson,* 5 Day, 79, Chief Justice SWIFT giving the opinion, in which he said:

> "An attaching creditor acquires no right, title or interest in land, by force of an attachment. The attachment has no effect but to take the land into the custody of the law, to secure it against the alienation of the debtor, and the attachment of other creditors, and to hold it to be levied upon by an execution, when judgment shall have been obtained. It is by force of the levy of the execution that any right or title to the land is acquired."

The attaching creditor has neither the possession of, nor any interest in, the land attached and has therefore no interest in the rents and profits thereof.

We are concerned only with the effect of a garnishment of debts and personal effects in the hands of an agent, trustee or debtor, and therefore limit our discussion to the law relating to such garnishments.

A. *The question is not altered by the assignment of the deposits to the United Hatters of North*

America, for the rights of the assignee are no greater than those of the assignor and are subordinate to the rights of the attaching creditor. The question is merely whether the debtor whose deposit is attached can run off with the profits or usufruct of that deposit.

> "But if, as we have understood to be conceded, though the fact does not appear upon the record or upon the motion, the assignment of the debt to the defendants was after the attachment of it by the plaintiffs, then the defendants took the exact interest of Durand (the assignor) in the debt, neither more nor less, which was an interest subject to the lien of the plaintiffs' attachment, so far as that attachment and the proceedings founded upon it were regular and legal. Taking, therefore, the interest of Durand, they would stand precisely in his place and could make any defense which he could make and none which he could not make."
>
> *Coit* v. *Haven,* 30 Conn., 197.

> "As regards assignments after the service of the process of garnishment upon the garnishee, the contrary doctrine prevails and the effect of the writ cannot be defeated by a subsequent assignment by the principal defendant, even though the assignee had no notice of the garnishment proceedings. This rule is based on the principle that *the plaintiff in garnishment succeeds to all the rights of the principal defendant* and the latter cannot by any act of his own defeat the rights of the former acquired thereby."
>
> 14 *Am. & Eng. Ency. of Law,* 858, and cases cited.

> "On the other hand, as the garnishing creditor succeeds to all rights and interests of the defendant at the service of the writ, the rights of the garnishing creditor are not

> affected by any alienation by the defendant or incumbrance created or arising subsequently to the service of the writ."
>
> 14 *Am. & Eng. Ency. of Law,* 867, and cases cited.

If, therefore, the United Hatters are entitled to recover the interest, then the original defendants, in the absence of the assignment, would have had the right to demand and receive, as fast as they came due, the interest and dividends which were payable on the deposits held by virtue of the attachment, notwithstanding that under Section 891 of the Connecticut General Statutes, the attaching creditor is entitled to the savings bank book for all the purposes for which such book is issued and is subrogated to all the rights of the depositors. Such a claim conflicts with the recognized rule that the rights of the attaching creditor and his ultimate title to the fund, if successful, relates back to the date of service and operate as an inchoate assignment of the attached fund.

B. *Since the plaintiff's title to these deposits relates back to the date of the attachment, so that he owned the deposits on all the dates when dividends were declared thereon, it necessarily follows that he owns the dividends which are inseparable from the deposits.*

The service of the attachment operated as an inchoate assignment, so that the plaintiff's title relates back to date of service and includes all dividends declared in the interim. As long as the impounded fund is earning profits, those profits, which are but an incident thereto, are alike impounded.

> "The effect of the garnishment is to make the garnishee the trustee of the money of the

defendant. The service of the garnishment process operates as *an inchoate assignment* to the plaintiff of the demand which the defendant had against the garnishee, and after judgment any payment which the latter may make in due course of law will protect him from any demand which the principal debtor may thereafter make against him. It places the attaching creditor in the same relation to the garnishee as that occupied by the debtor before the attachment was laid, securing to him all chattels, moneys, evidences of debt or any interest which the debtor has in them, * * * and this lien, such as it is, takes effect from the time of service."

Shinn on Attachment and Garnishment, Sec. 613.
Tyrell v. *Rountree,* 7 Pet., 462.
Drake on Attachments, Sec. 221.

In the case of *Jacobus* v. *Monongahela National Bank,* 35 Fed., 395 (1888), the bank having recovered judgment against Patterson, attached shares of stock in a railroad company which stood in the name of Jacobus, and when Jacobus and the railroad company were summoned as garnishees, Jacobus pleaded *nulla bona,* and the railroad company pleaded that the stock belonged to Jacobus. That case was decided by the United States Supreme Court (109 U. S., 275) on November 19th, 1883, in favor of the garnishees. At the time the attachment was served, the railroad company had in its hands a dividend of $264 on said stock, and from time to time thereafter twenty-one other dividends of $264 each were declared, and all said dividends were retained by said railroad company until the decision by the Supreme Court, when the railroad company paid the money to Jacobus without interest. This suit was brought on the recog-

nizance furnished by the bank to pay damages caused by the attachment, and the question arose as to whether the attachment compelled the railroad company to withhold the payment of subsequent dividends. Upon this point, the Court said:

> "But the defendant's counsel contend that the dividends declared after the filing of the pleas in the attachment suit were not subject to the attachment; and in support of this view they cite the case of *Benners* v. *Buckingham,* 5 Phila., 68, in which it is said that whatever comes into the hands of a garnishee in an execution attachment, after *nulla bona* pleaded, cannot be given in evidence at the trial of the issue. Whether this is consistent with the decision of the Supreme Court of Pennsylvania in *Sheetz* v. *Hobensack,* 20 Pa. St., 413, that the garnishee in an execution attachment is liable for moneys of the defendant debtor coming into his hands after the service of the writ, need not now be considered. The doctrine declared in *Benners* v. *Buckingham,* if correct, has no application here. *This was not the case of a distinct and independent fund coming into the garnishee's possession after plea filed. The dividends were but an incident to the stock—the mere fruits thereof—and were as much within the grasp of the attachment as the corpus of the stock was.* It has been adjudged that an execution attachment becomes a lien on the debtor's stock from the date of the service on the corporation; and upon a judgment therein, and a sheriff's sale, *the purchaser of the stock takes the judgment-debtor's title as of the date when the attachment was served."*

See also:

Cook on Corp., 7th Ed. (1913), Vol. II, Sec. 484, p. 1359.

Moore v. *Gennett,* 2 Tenn. Ch., 375 (1875).

The result of the defendants' contention, adopted by the District Court, would be to give the defendants *interest* when they did not own the *principal;* to give them *dividends* when they did not own the *deposits;* to give them damages for detention of property when they did not own the property. It creates the absurd result of vesting the ownership of the principal in one person and the ownership of the usufruct or interest in another.

C. *The garnishee having mingled the attached funds with his own and earned profits thereon, the attaching creditor is entitled to recover interest.*

In the case of *Woodruff* v. *Bacon,* 35 Conn., 97, the same question was raised, the defendant claiming (p. 101) that the garnishee had been restrained by process of law from paying the principal, and that there was no agreement to pay interest; but the Court said (p. 104):

> "The defendant also insists that he should not have been charged with interest on the money in his hands. But the finding shows that the defendant, when he received this money, mingled it with his own funds in one common mass, from which he withdrew so much as he had occasion to use from time to time as he saw fit; and at times he did not have on hand an amount of cash equal to the amount for which this suit was instituted. As, therefore, he actually had the use of a part of this fund, and as he treated it all as if it was his own, and as he did not keep it by itself, or so keep it that he could pay it over to the rightful owner when called on for that purpose, he clearly ought to pay interest. It is, however, claimed that the defendant is not liable for interest to the plaintiffs even if he would have been liable therefor to the original debtors, for whom he collected the money, because the interest, it is

said, is not due by reason of any contract, but only as damages for the detention of the money, and damages, it is claimed, cannot be attached. *But we cannot recognize the principle that should allow the plaintiffs to recover the debt and not allow them to recover the interest which is the mere incident to the debt arising from the defendant's use of it.*"

In the case of *Cox* v. *Cronan,* 82 Conn., 176, the Court said:

"When money belonging to a defendant is attached in the hands of a third party by process of foreign attachment, the garnishee cannot safely pay it over to either party pending the continuance of the suit in which it is attached, but must hold it to abide the result of the action. If he is not under contract to pay interest, and makes no use of the money, but retains it as a mere stakeholder, he will not be liable for interest until the result of the suit determines to which party he shall pay it. *Candee* v. *Skinner,* 40 Conn., 464, 468; *Phoenix Ins. Co.* v. *Carey,* 80 *id.,* 426, 432; 68 Atl., 993. But when he mingles the money attached with his own and has the use of it, he is liable for the interest on it."

See also:

Mattingly v. *Boyd,* 20 How. (U. S.), 128.

"It is well settled that a garnishee is *liable to the plaintiff for interest* on the amount of his indebtedness to the defendant during the pending of the garnishment proceedings if he had promised the defendant to pay interest or *if he received interest* or used the money during that time."

14 *Am. & Eng. Ency. of Law,* 837, 838.
22 *Cyc.,* 1559-1560.

In all cases where the garnishee has not been held for interest, there was no proof that the money had actually earned profits, and the issue was whether the garnishee, by virtue of his position, was chargeable with interest, *as a matter of law,* regardless of whether it was or was not earned. In cases where it affirmatively appears that the funds have been profitably employed and the principal has been augmented by virtue of such profitable employment, the principal and the increment are inseparable and always belong to the attaching creditor. There is no question here but that interest has been earned and should be paid, but merely to whom shall it be paid. It was admitted by the defendants, and is admitted in the opinion of the Trial Court, that if the garnishee "has mingled the money attached in his hands with his own" (p. 17), he must pay interest on it *to the attaching creditor,* and this is based on the theory that the garnishee is deriving benefit therefrom. If it be true that he cannot employ the funds for his own benefit without paying interest *to the attaching creditor,* by what show of reason can it be claimed that he can avoid doing so by employing them for the profit of the very men the plaintiff is pursuing—the defendants themselves? Can the defendant by an arrangement with his trustee, agent or debtor, to employ the money for his benefit, thereby impair the plaintiff's rights? It is admitted that if the garnishee employs the money for his own profit, even if those profits are *contingent,* those profits belong to *the attaching creditor;* that if the garnishee wrongfully used the funds, interest is given *the attaching creditor* as damages. The reason is that the attaching creditor is deemed to have owned the property during this period, and it is only the owner of the property who can be damaged by its detention, or profit by

its income. So, likewise, it is the owner of the property who should receive the profits, dividends or interest which have been previously fixed by agreement between the garnishee and the defendant, as in the case at bar. There is no possible arrangement whereby the defendant can continue to enjoy the benefits of his attached money. If it were in his own possession, it would be taken from him on the levy, and he could not use it. Since it is in the hands of a third party, the plaintiff, by attachment, stands in the shoes of the defendant; the plaintiff thus inherits the defendant's action for damages for misappropriation of the money by the garnishee, for agreed interest, and for agreed dividends, whether conditional or unconditional. As long as the fund is used for profit, those profits, whether earned for the benefit of the garnishee or the debtor, are impounded for the benefit of the attaching creditor for the same ultimate disposition as the principal of which they are the incident.

> "If he has attachable funds in his hands which he has put at interest, he is liable for what they yield. If he has property attachable, he is responsible for its fruits which he gathers after notice. If he uses what is attached in his hands in his general business so that it is not distinguishable from his own property or funds, he should account for its usufruct, if practicable, or pay legal interest on the amount or value."
>
> *Waples on Attachment and Garnishment,* 2nd Ed., Sec. 932.

In the case at bar it appears as one of the agreed facts (p. 20) which is embodied in the judgment (p. 13):

> "That since said attachment, the defendant herein has, in accordance with the terms

> of its charter, used and improved the moneys so deposited with it and has regularly declared dividends upon said several deposits payable from the income and profits earned by the defendant from these and its other deposits, and that the aggregate amount of dividends so declared upon the several deposits, levied upon by said writ of attachment, is $11,278.13."

Here is a finding of fact, that the attached deposits were mingled with the funds of the defendant bank, that profits had been made thereon, and that dividends had been specifically declared and appropriated from the profits so earned to reward the owner of the deposits. It would seem too plain for argument that these profits belong to the plaintiff whose title relates back to the date of attachment.

The Trial Court (pp. 16-17), and the attorney for the United Hatters, laid particular stress upon the word *"due"* in the statute, and held that inasmuch as the interest and dividends were not due, they could not be attached. Of course, there could be no valid levy unless there was a principal fund absolutely payable, but once having made a valid levy on such an attachable principal, the lien extends to the interest as a mere incident (*Jacobus* v. *Bank, supra*). In the cases cited by the defense there was no fund upon which a valid levy could be founded. The Court appears to have been convinced by these inapplicable authorities and the use of the word "due" in the statute, but the force of the argument is destroyed by the admission (p. 17) that if there was an agreement to pay interest, or the garnishee used the funds, "the interest may be attached as incident to the debt." But surely agreed interest is not more *"due"* than the agreed dividends accruing on the bank deposits. If the

word *"due"* were a bar to the recovery of these stipulated dividends because they accrue in the future, it would be equally a bar to the recovery of stipulated interest, for one is not more *"due"* than the other. The element of *futurity* is the same in each case. If agreed interest "may be attached as an incident to the debt," as held by the Trial Court (p. 17), then these dividends which are also agreed upon and are as much an incident of the debt are covered by the attachment of the principal. The fact that by the terms of the agreement the payment of dividends is dependent on certain contingencies does not alter the situation. If profits had been earned by the garnishee, the defendants admit they would have gone to the attaching creditor, even though they were contingent. Therefore, *contingency* is no test. According to the defendants' distinction, if there were an absolute agreement to pay 3 per cent. interest, with an additional bonus of 1 per cent. interest payable under certain conditions, the attaching creditor would be entitled to the 3 per cent., and the debtor could run off with the 1 per cent. To such absurdities do the defendants' arguments lead. There is no argument in support of the admission that agreed interest and damages for detention are held by the attachment which does not equally support the proposition that these dividends are held. In these other cases it is agreed income or uncertain profits earned by the garnishee which are held as an incident to the debt, and the elements of both futurity and contingency are present. The question is, who is entitled to the usufruct of the impounded fund? We say the attaching creditor; defendant says the attaching creditor if there is agreement to pay interest or if the garnishee uses the funds for his own profit; but there they stop, in the

middle of the river, and assert that if profits not absolutely agreed are made for the benefit of the debtor himself, the attaching creditor, the opposite rule must apply. The distinction is both illogical and inconsistent.

D. *The garnishment process places the attaching creditor in the shoes of the debtor.*

Whatever rights the debtor had as a depositor in the defendant bank are liened by the attaching creditor, who becomes subrogated to the rights of the debtor.

> 14 *Am. & Eng. Ency. of Law,* 867.
> *Shinn on Attachment and Garnishment* (*supra*).

E. *It is the policy of the Connecticut statutes relative to garnishment that all of the debtor's property should be reached thereby, and the same are to be liberally construed.*

> "The statute, having been made for the suppression of fraud, has always received a liberal construction."
>
> *Treadway* v. *Andrews,* 20 Conn., 394.

In *Knox* v. *Protection Ins. Company,* 9 Conn., 433, the Court said:

> "The object of the statute is to secure for the benefit of the creditor *all* the property of the debtor—all his goods, effects and credits."

In *Gager* v. *Watson,* 11 Conn., 168-171, speaking of our foreign attachment statute, the Court said:

> "The policy of our laws has ever required that the property of a debtor not exempted by law from execution, should be subject to the demands of his creditors; and that every facility, consistent with the reasonable immunities of debtors, should be afforded to subject such property to legal process. And this policy is at least as obvious now as formerly; for the rigour of former laws regarding imprisonment for debt has been, and probably will be still more, relaxed."

In *Sutherland* v. *Brown,* 85 Conn., 67, the Court said:

> "It is the policy of our law that all the property of a debtor not exempt from execution should be subject to the demands of his creditors, and that every facility consistent with the reasonable immunities of debtors should be afforded to subject such property to legal process."

In *Ransom* v. *Bidwell,* 89 Conn., 140, the Court said:

> "Our statutes relating to foreign attachment were designed to carry out more effectually the policy of our law that all the property of a debtor not exempt from execution should be made subject to the payment of his debts, and that every facility consistent with the reasonable immunity of the debtor should be afforded to subject such property to legal process."

In the case of *Woodruff* v. *Bacon,* 35 Conn., 97, page 105, the Court said:

> "In the case of *Knox* v. *The Protection Ins. Co.,* 9 Conn., 439, we held that an un-

> adjusted claim for damages for a loss on a policy of insurance might be attached by this process in a suit against the holder of the policy. The object of our statute was said in that case to be 'to secure for the benefit of the creditor all the property of the debtor and all his goods, effects and credits.' And giving the statute a fair construction as a remedial statute, we think the trustee should be held liable for all of his debt, whether principal or incident in the shape of interest, which his creditor could recover of him."

The fact that Section 833 of the General Statutes of Connecticut expressly states that the dividends and profits on stock are held by its attachment is further evidence of this general purpose to reach all the debtor's property.

That statute, enacted in 1805, provided a simple means and method whereby stock in domestic corporations could be attached directly, and was a substitute for the method of reaching it by foreign attachment, if such method then existed, as to which there seems to have been some doubt because of the peculiar relation of a stockholder to the corporation and its assets. Of course it was proper in the substitute to provide for reaching the dividends and profits accruing to the holder of such stock in pursuance of the general policy of the attachment law of the state relating to personal property.

Speaking of that statute, in *Middletown Savings Bank* v. *Jarvis*, 33 Conn., 379, the Court said:

> "And the purpose is as obvious as the language. The object is to subject the whole of every man's property to the payment of his debts. The courts favor such a construction

as will produce this result. 'The policy of our law is that every species of property shall be responsible for the payment of debts.' *Punderson* v. *Brown,* 1 Day, 96; *Flagg* v. *Platt,* 32 Conn., 216. See also the Opinion of Ch. J. Williams in *Davenport* v. *Lacon,* 17 Conn., 280."

And in the later case of *Winslow* v. *Fletcher,* 53 Conn., 393, speaking of that case, the Court said:

"The counsel for the assignees claimed that Jarvis' interest in the stock could only be taken by bill in equity or by the process of foreign attachment. Counsel for the attaching creditor contended, in an elaborate brief, that foreign attachment would not reach it. Of course the main question was, whether the stock was well attached. The court held that it was. Strictly speaking, the court had no occasion to say that it could not be attached by foreign attachment; but the court, by McCurdy, *J.*, says: 'We do not see very well how the case comes within the provisions of the law of foreign attachment, but it certainly does come precisely under the statute to which we have referred.' Now if the stock in the present suit was the stock of a domestic corporation, that case is a precedent for holding that it might have been attached directly by the ordinary process. That being so, it was not subject to the law of foreign attachment, for it was not concealed. In its nature it was as incapable of concealment as real estate. It was at all times available, accessible property, and open to attachment."

It is obvious that it was not the object of Section 833 of the Connecticut Revised Statutes (1902) to single out for some special reason the increment and profits on shares of stock in corporations as alone to be held by attachment of the

principal fund to which they were an incident, but rather to make the lien provided for therein to extend to and cover such increment in the same way as the lien by garnishment had always extended to the increment or profits of funds in the hands of an agent, trustee or debtor of the defendant. The purpose and history of this section is clearly explained in *Barber* v. *Morgan*, 84 Conn., 621, 622.

F. *The defendant savings bank was garnished as "the agent, trustee and debtor" of the original defendants, in strict conformity with the requirements of the state attachment law.* The deposits attached had been received and were held by it as their "agent and trustee" according to the terms of its charter, which created and established its agency and trusteeship. It used and improved such attached deposits as required by its charter, in conformity to the terms of its agency and trusteeship, for the profit of said defendants, and declared dividends thereon to them. Such dividends were part of the deposits and belong to the depositors. All funds of the defendant belong to the original defendants as depositors and the other depositors.

The defendant is a savings bank without capital stock whose charter expressly provides that "all deposits of money received by said corporation *shall be used and improved to the best advantage* • • • and the income or profits therefrom *shall be applied as dividends among the persons making the deposits,* their executors and administrators, in just proportion, with such reasonable deduction as may be chargeable thereon." That such an institution is the *agent and trustee* of the depositors is well settled in Connecticut as in other jurisdictions,

and the dividends and interest on their deposits are a part of the deposits and belong to them.

> "A savings bank in this commonwealth is an institution formed for the purpose of receiving deposits of money for the benefit of the depositors, investing the same, accumulating the profit or interest thereof, paying such profit or interest to the depositor, or retaining the same for his greater security, and further of returning the deposit itself. The regulations as to the payments of interest and return of deposit are prescribed partly by statute and partly by the institution itself. There is no capital stock, and there are no stockholders who are entitled to receive profits from the business. All these belong to the *depositors* and nothing is deducted therefrom except the necessary expenses of transacting the business."

Commonwealth v. *Redding Savings Bank,* 133 Mass., 19.

Stockton v. *Mechanics Bank,* 32 N. J. Eq., 166.

Una v. *Dodd,* 39 N. J. Eq., 182.

> "The charter makes the safe-keeping and investment for profit of the deposits the sole purpose of the creation of the bank. The depositors do not personally loan the money deposited, but entrust it to the bank *as their trustee or agent* to be kept, invested, managed and paid out according to the provisions of the charter and by-laws of the institution. If there is profit, they receive it; if there is loss, they carry it according to the amount of their deposits. *Bunnell* v. *Collinsville Savings Society,* 38 Conn., 203; *Huntington* v. *Savings Bank,* 96 U. S., 388, 393, 394."

Hall v. *Paris,* 59 N. H., 73.

Ward v. *Johnson,* 95 Ill., 241.

People ex rel. Newburg Savings Bank v. *Peck*, 157 N. Y., 57.

Mechanics Savings Bank v. *Granger*, 17 R. I., 79.

Rutland Savings Bank v. *Rutland*, 52 Vt., 464.

Price v. *Society for Savings*, 64 Conn., 366.

Savings Bank v. *New London*, 20 Conn., 117.

"The Watertown Savings Bank was duly chartered under the Laws of this State in 1893. The object of this institution is set forth in S. 3 of its charter, which provides that 'all deposits of money received by said corporation shall be used and improved to the best advantage, by loaning and investing the same in a manner not inconsistent with the laws of this state, and said corporation may dispose of the same as the interests of said corporation may require, and the income or profits thereof shall be applied as dividends among the persons making the deposits, their executors and administrators in just proportion, with such reasonable deduction as may be chargeable thereon.' 11 Special Laws, p. 383. These are all the provisions of the charter which relate to the question now under consideration. *It is to be noticed that there is no capital stock and there are no stockholders who are entitled to receive profits from the business. It is clear that all these belong to the depositors, and nothing can properly be deducted therefrom except the reasonable expenses of transacting the business.*

The sums of money which the defaulting treasurer withdrew were taken out of the deposits received by the bank and the income and profits derived therefrom by loans and investments. *They all belonged to the de-*

positors. This money which the receiver now has for distribution has all the characteristics of the money which it replaced. Like the original deposits and their income or profits, it must be applied under the charter of the bank as above quoted. *Price* v. *Society for Savings,* 64 Conn., 362, 366; 30 Atl., 139; *Bunnell* v. *Collinsville Savings Society,* 38 Conn., 203, 206; *Morristown Institution for Savings* v. *Roberts,* 42 N. J. Eq., 496; 8 Atl., 315; *Huntington* v. *Savings Bank,* 96 U. S., 388.

Counsel for the bondsmen point to ss. 3440 and 3441 of the General Statutes, which are as follows: 'The net income of any savings bank, in excess of one-eighth of one per cent. of its deposits, actually earned during the six months last preceding, and no more, may be semi-annually divided among its depositors. No dividend shall exceed a rate of four per cent. per annum, except as provided in s 3441. No savings bank shall make any dividend, except as provided in s 3440, until its surplus shall have accumulated to an amount equal to three per cent. of its deposits. Such surplus shall be kept as a contingent fund; but no savings bank shall carry to its contingent fund more than ten per cent. of its deposits; and any surplus beyond that amount shall be divided among the depositors entitled to such dividends, in sums of not less than one per cent. of its deposits.'

It is claimed that 'since the savings bank is the creature of statute, there is no other legal means or method of making disposition of its funds, save strictly as provided by statute; and that the liability, legal or equitable, of the savings bank to its depositor, is a fixed and constant relation that does not vary, whether the bank is or its not solvent.' It is also contended that 'the purpose of the surplus is to protect the depositor; but the laws gives to the depositor no way of reaching the surplus. Indeed, our courts seem to

sustain the view that the end and purpose of the deposits is to keep up the surplus.'

It is true that the profits or income of savings banks are not all payable at the same time or in the same way, and that they may be held by the bank as a fund until they have reached a specified amount. This is for the sole purpose of protecting depositors against unforeseen contingencies. There is nothing in these statutes which militates against the general proposition that the income or profits of savings banks belong to the depositors and are a part of the deposits. In the end, it is the general spirit and purpose of the charters of savings banks and of the laws of this state, *that depositors, or their representatives, are entitled to all the pecuniary benefits arising from the deposits, less the reasonable expenses that may be chargeable thereon.*"

Bank Commissioners v. *Watertown Savings Bank,* 81 Conn., 264.

Huntington v. *Savings Bank,* 96 U. S., 388.

We must not, therefore, be misled by the word dividends, which bears no more likeness to ordinary dividends than deposits to shares of stock. All of these dividends and deposits, whether distributed or undistributed, belong absolutely to the depositors, and the bank only acts as their joint agent.

We have, therefore, the case of an agent or trustee of the defendants using the defendants' money for profit under the direction and authorization of the defendants, so that all of said money and the profits earned thereon belong to the defendants and are subject to distribution under certain restrictions. Furthermore, such profits so earned for the benefit of the defendants have been actually distributed to the said defendants by crediting the amount thereof to the attached fund. It is admitted

that if the savings bank had used this money for its own profit, interest would be recoverable, but it is claimed that since the profits were earned for the benefit of the debtor himself, they are not recoverable. It is admitted that if the savings bank had agreed *unconditionally* to pay a stipulated rate of interest, that such interest would be recoverable, but it is contended that inasmuch as the agreement to pay interest is *conditional*, it is not recoverable. We submit that there is nothing in any of the principles laid down in the pertinent cases which justifies any such technical and unjust distinction, and that the liberal construction by which remedial statutes of this character are to be interpreted, together with the general purpose of these acts, militates against any such conclusion. It is believed that no method exists where the defendant directly, or through his agent, can continue to use for his own benefit an attached debt definitely payable a certain number of days after demand.

POINT II.

If the plaintiff is not entitled to recover the accrued dividends, he is entitled to recover 6 per cent. interest, because the defendant mingled the attached funds with its own and used them for profit.

It is found as a fact that the garnishee mingled these funds with his own and used them for profit (p. 20), and it is conceded by the Trial Court in its opinion that a garnishee who "has mingled the money attached in his hands with his own" must pay interest (p. 21).

We submit, upon the grounds set forth in this brief, that the usufruct of the attached fund, whether it be in the form of agreed interest, damages for wrongful detention, or savings bank dividends, follows the principal fund and belongs to the attaching creditor, in accordance with the principles laid down herein by the United States Circuit Court of Appeals, which should be sustained.

Respectfully submitted,

DANIEL DAVENPORT,
WALTER GORDON MERRITT,
Attorneys for Defendant-in-Error.

SAVINGS BANK OF DANBURY, OF DANBURY, CONNECTICUT, *v.* LOEWE, AS SURVIVING PARTNER OF THE FIRM OF D. E. LOEWE & COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 713. Argued December 11, 1916.—Decided January 8, 1917.

Under the statutes of Connecticut, a garnishment of deposits in an ordinary savings bank without stockholders which is subject to a fiduciary duty to hold and invest for the benefit of its depositors all funds that it receives and to pay over to them the net income beyond enough to constitute a small safety fund, Gen. Stats., §§ 3440, 3441, reaches not only the principal of the deposits but also the dividends that accrue after service of the writ.

The lien is not affected by an assignment of the savings accounts made after the service.

236 Fed. Rep. 444, affirmed.

THE case is stated in the opinion.

Mr. William F. Tammany, with whom *Mr. John H. Light* was on the brief, for plaintiff in error.

Mr. Walter Gordon Merritt and *Mr. Daniel Davenport* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is *scire facias*, where the statutes of Connecticut provide a similar remedy, to recover savings bank accounts attached by trustee process in the hands of the plaintiff in error, judgment having been recovered in the original suit by the defendant in error and execution taken out. The garnishee submitted itself to the judgment of the court, admitting deposits, but setting up that after the attachment the accounts had been assigned to the United Hatters of North America and that the assignee claimed the dividends that had accrued since the writ was served. The assignee was cited, appeared and made the claim. The principal, except an item of $428.52, now has been paid, and the right to the dividends is the only question in the case. The Circuit Court of Appeals decided that the attaching creditor had the better right. 236 Fed. Rep. 444.

There is no doubt that under the statutes of Connecticut, as usual elsewhere, a garnishment reaches only effects of the defendant in the hands of the garnishee at the time of service upon the latter, as distinguished from contingent liabilities that do not become effects in the garnishee's hands until a later time. Gen. Stats. 1902, §§ 880, 931. But the commonest object of such attachments is a right, regarded as a thing within reach of the process because of the power of the court over the person subject to the corresponding obligation. *Barber* v. *Morgan*, 84 Connecticut, 618, 623; *Osborn* v. *Lloyd*, 1 Root, 447; *Harris* v. *Balk*, 198 U. S. 215, 222. If the right is vested the attachment reaches the whole of it, and therefore, there being no doubt that a *debitum in præsenti solvendum in futuro* could be attached, Gen. Stats., § 936, it was admitted at the argument that in the case of an interest-bearing debt the subsequently accruing interest was held as well as the principal. The obligation to pay the one stands on the same footing as the obligation to pay the

other; the two are one, they are limbs of the same contract, and there is no reason for splitting them up. *Adams* v. *Cordis*, 8 Pick. 260, 269. It may be true that apart from statute the attachment of stock in a corporation would not hold subsequently declared dividends, but, if so, that is because the stockholders have no right to the dividends until they are declared, which may never be if the directors see fit to convert earnings into capital. *Gibbons* v. *Mahon*, 136 U. S. 549. Compare *Norton* v. *Norton*, 43 Ohio St. 509, 525. The question then narrows itself to whether the so-called dividends of savings banks are analogous to dividends of a corporation or to interest due by contract upon a debt.

The plaintiff in error is an ordinary savings bank without stockholders. It is subject to a fiduciary duty to hold and invest for the benefit of its depositors all the funds that it receives and to pay over to them all the net income earned, after the retention of enough to constitute a small safety fund. Gen. Stats., §§ 3440, 3441. This duty certainly is no less because created by statute rather than by contract. It is guarded by other statutes limiting the investments allowed and requiring inspection, with the object of making principal and income secure rather than large. Gen. Stats., §§ 3428, 3457. The minimum amount of the dividends generally is as fixed in practice as if it were written in a bond. The practical certainty that a savings bank will pay is greater, in short, than that an average debtor will pay six per cent. according to his promise in a note. The only element of uncertainty other than that conditioning all future conduct, is the possibility that the dividend may be greater than that which experience has led the depositor to expect. He has a vested right to the dividends, a vested right that the corporation should take the most prudent steps to secure them, with an identified fund devoted to the result. We do not perceive why the possibility of there being no earnings because

of fraud or a cataclysm, or a possibility of the earnings being greater than was expected, should make the right less a present one, subject to and covered by the attachment, than the right to the capital, which runs the same risks, *Bunnell* v. *Collinsville Savings Society*, 38 Connecticut, 203, or than that arising from the promise of a debtor who may fail or abscond, or, if a corporation, may have no assets.

The case certainly is not weakened, it rather seems to us to be strengthened by the fact that the statutes of Connecticut provide that the levy of attachments and executions upon even the shares of a corporation shall include dividends growing due thereon. The provision indicates a policy, and although of course the words do not include dividends from savings banks, as in our opinion they did not need to, it is only by imagining unreal distinctions that the policy embodied in the statute, and extending by the common law to interest due upon contract, can be held to exclude the claim to subsequently earned income of ordinary savings banks, when that claim as we have tried to show is a vested right. *Middletown Savings Bank* v. *Jarvis*, 33 Connecticut, 372, 379. See *Norton* v. *Norton*, 43 Ohio St. 509, 525.

No argument against our conclusion can be based on the right to release the attachment by giving a bond equal to the value of the effects attached. Gen. Stats., §§ 849, 852. We presume that ordinarily a plaintiff would be satisfied with a bond for the principal of a debt or deposit. If he should raise a question we will wait for the Connecticut courts to decide whether he might or might not be entitled to more.

Finally, the assignment of course has no effect upon the rights of the defendant in error. If the attachment would have held dividends as against the original defendant it holds them as against the assignee.

Judgment affirmed.